Applicant Details

First Name	**Grant**
Middle Initial	**W**
Last Name	**Coffey**
Citizenship Status	**U. S. Citizen**
Email Address	**grant_coffey@txnb.uscourts.gov**
Address	**Address** Street **3812 47th Street** City **Lubbock** State/Territory **Texas** Zip **79413** Country **United States**
Contact Phone Number	**18063174408**

Applicant Education

BA/BS From	**Texas Tech University**
Date of BA/BS	**May 2019**
JD/LLB From	**Texas Tech University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=74408&yr=2011**
Date of JD/LLB	**May 14, 2022**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Texas Bank Lawyer** **Journal of Biosecurity, Biosafety & Biodefense**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Texas Tech University Board of Barristers Appellate Lawyers Association 2020 National Moot Court Competition**

Bar Admission

Admission(s) **Texas**

Prior Judicial Experience

Judicial Internships/ Externships **No**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Specialized Work Experience **Bankruptcy, Patent**

Recommenders

Beck, Brandon
brandon.beck@ttu.edu
5126579093

Jones, Robert
judge_robert_jones@txnb.uscourts.gov

Beyer, Gerry
gerry.beyer@ttu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Grant Coffey
3812 47th
Lubbock, Texas 79413
806.317.4408
grant_coffey@txnb.uscourts.gov

February 26, 2023

The Honorable David Steven Morales
United States District Court
United States Courthouse
1133 North Shoreline Boulevard, Room 320
Corpus Christi, Texas 78401

Dear Judge Morales:

I seek a position as a law clerk for a one–year term beginning in September of 2024. Clerking in your chambers is particularly appealing to me because I plan on practicing law in Texas, and I want to clerk for an Article III judge.

Diversity is an important consideration for law clerk hiring. On its face, a white man from West Texas does not appear to be a diverse addition to any team. But I bring cultural awareness stemming from my experiences as a West Texan based on the people—from farm hands to foreign academics—I have met and worked with. My unique perspective was influenced by (1) my mother, a social worker, and my father, a nurse, (2) my partner who worked at a domestic violence shelter, (3) my experience in agriculture, and (4) the years I worked closely and successfully with people having different viewpoints.

Beyond my perspective, my ability to excel in the legal field is shown by my rank in the top 5% of Texas Tech University School of Law, which I achieved while receiving my M.S. in Biotechnology with a 4.0 GPA. Subsequently, I gained experience as the law clerk for the Honorable Robert L. Jones in the United States Bankruptcy Court for the Northern District of Texas. Beyond bankruptcy, I have experience with property, intellectual property, and antitrust law.

Shifting from my legal and academic qualifications to my personal qualities, I am adventurous and scholarly. Together these qualities create a love of learning. This love of learning has fostered itself in many of my hobbies—caring for bees, plants, corals, and dogs; reading; baking breads; hiking; and repairing cars. One reason I love the law, and clerking, is that I am always learning. This positive attitude and willingness to learn sets me apart and makes me fun to work with.

Above, I attribute my experiences in Lubbock, Texas to my unique outlook, and you might wonder why I am interested in leaving. After spending 26 years in Lubbock, it is time to move to the next chapter and Corpus Christi would be an exciting place to begin.

Thank you for your time and consideration.

Respectfully,

Grant Coffey

Grant Coffey

3812 47th Street
Lubbock, Texas 79413

806.317.4408
grant_coffey@txnb.uscourts.gov

LICENSE

Licensed by State Bar of Texas — November 2022

EDUCATION

Texas Tech University School of Law, Lubbock, Texas

Doctor of Jurisprudence/Master of Science in Biotechnology — May 2022

Rank 6 out of 126 – Law GPA 3.83, summa cum laude, Order of the Coif

Dual degree program – graduate GPA 4.0

Top Grade in Patent Law, Trademarks and Unfair Competition, Wills and Trusts, Criminal Law, and Texas Marital Property

Distinction award in Commercial Law, Business Entities, Introduction to Intellectual Property, Constitutional Law, and Legal Practice II

Selected for the ABA Judicial Clerkship Program

Tutor for Property Spring 2021, and Spring 2022; Teaching Assistant for Wills and Trusts

Journal of Biosecurity, Biosafety, & Biodefense Law, Associate Editor

Texas Bank Lawyer, Contributing Writer and Editorial Board Member

National Moot Court Team Brief Writer

Texas Tech University, Lubbock, Texas

Bachelor of Science in Plant and Soil Science – GPA 3.341, Dean's List — May 2019

EXPERIENCE

Law Clerk to the Honorable Robert L. Jones, Lubbock, Texas — August 2022 – August 2023
U.S. Bankruptcy Court, Northern District of Texas
Draft opinions and memoranda; conduct legal research; attend trials and hearings

Texas Office of the Attorney General, Summer Clerk, Austin, Texas — July 2021 – August 2021
Clerked with the antitrust division; assisted in complex litigation
Conducted legal research; drafted memoranda; and participated in document review (Everlaw)

Myers Bigel, Summer Associate, Raleigh, North Carolina — May 2021 – July 2021
Drafted responses to Patent and Trademark Office actions, claim amendments, and client correspondence

Office of Research Commercialization, Texas Tech University, Lubbock, Texas — May 2020 – May 2021
Assessed patentability, market practicality, and regulatory hurdles facing new technologies

Lubbock Impact—volunteer organization, Lubbock, Texas — Fall 2019 – Spring 2020
Tutored disadvantaged children, ages 6 through 15

Americot—cotton seed company, Lubbock, Texas — May 2019 – May 2021
Juggled law school with extracurricular work

BASF/Bayer—trait introgression greenhouse, Lubbock, Texas — October 2017 – May 2019
Maintained close communications with direct supervisors

ACTIVITIES AND INTERESTS

bee keeping, reading, gardening, powerlifting, backpacking/hiking, rafting, soccer, music

TEXAS TECH UNIVERSITY SCHOOL OF LAW

Grant William Coffey

Course Level: Law

Current Program
Doctor of Jurisprudence
Program : Law JD
College : School of Law
Campus : Lubbock TTU
Major : Law

Comments:
Rank 41 out of 145 as of 1/7/20
Rank 25 out of 138 as of 6/2/20
Rank 9 out of 131 as of 1/7/21
Rank 7 out of 133 as of 6/1/2021
Rank 7 out of 127 as of 01/04/2022
Final Rank 6 out of 126 as of 05/26/2022

Awarded Degree Doctor of Jurisprudence 14-MAY-2022
Primary Degree
Program : Law JD
College : School of Law
Campus : Lubbock TTU
Major : Law
Inst. Honors: Summa Cum Laude

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R

TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:

ENROLLED TTU Texas Tech University

BTEC 5301	Intro to Biotechnology	3.00 TZ		
BTEC 5322	Bioinformatics Methods	3.00 TZ		
CHEM 5330	Biochemistry I	3.00 TZ		
CHEM 5332	Biochemistry III	3.00 TZ		

Ehrs: 12.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00

INSTITUTION CREDIT:
********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R

Institution Information continued:

Fall 2019 Law

LAW	5306	Legal Practice I	3.00	B	9.00
LAW	5402	Contracts	4.00	B	12.00
LAW	5404	Torts	4.00	B	12.00
LAW	5405	Civil Procedure	4.00	A	16.00
LAW	6108	Intro. to the Study of Law	1.00	A	4.00

Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 53.00 GPA: 3.31

Spring 2020 Law

LAW	5307	Legal Practice II	3.00	A	12.00
LAW	5310	Criminal Law	3.00	A	12.00
LAW	5401	Constitutional Law	4.00	A	16.00
LAW	5403	Property	4.00	A	16.00

Ehrs: 14.00 GPA-Hrs: 14.00 QPts: 56.00 GPA: 4.00

Summer 2020 Law

LAW	6276	Products Liability	2.00	A	8.00
LAW	6357	Professional Responsibility	3.00	A	12.00

Ehrs: 5.00 GPA-Hrs: 5.00 QPts: 20.00 GPA: 4.00

Fall 2020 Law
Participated in The Journal of Biosecurity

LAW	6039	Intro to Intellectual Property	3.00	A	12.00
LAW	6319	Intro Emerging Technologies Lw	3.00	A	12.00
LAW	6339	Criminal Procedure	3.00	A	12.00
LAW	6434	Income Taxation	4.00	A	16.00

********** CONTINUED ON PAGE 2 **********

Grant Coffey
grant.coffey@ttu.edu

Page: 1

Unsecured * Unofficial

Janessa Walle
ASSISTANT DEAN OF ACADEMIC SERVICES AND REGISTRAR

OFFICE OF THE REGISTRAR - LUBBOCK, TEXAS 79409
3 digit course numbers changed to 4 digit numbers effective September 1983
Texas Technological College changed to Texas Tech University September 1, 1969
OFFICIAL CERTIFICATIONS BEAR REGISTRAR'S SIGNATURE WITH UNIVERSITY SEAL

TEXAS TECH UNIVERSITY SCHOOL OF LAW

Grant William Coffey

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Ehrs: 13.00 GPA-Hrs: 13.00 QPts: 52.00 GPA: 4.00						
Spring 2021 Law						
Participated in the Texas Bank Lawyer Journal						
LAW	6034	Trademarks Unfair Competition	2.00	A	8.00	
LAW	6040	Law and Science Legal Research	2.00	A	8.00	
LAW	6415	Wills and Trusts	4.00	A	16.00	
LAW	6420	Commercial Law	4.00	A	16.00	
LAW	7101	Journal of Biosecurity	1.00	CR	0.00	
Ehrs: 13.00 GPA-Hrs: 12.00 QPts: 48.00 GPA: 4.00						
Summer 2021 Law						
LAW	6008	Texas Marital Property	2.00	A	8.00	
Ehrs: 2.00 GPA-Hrs: 2.00 QPts: 8.00 GPA: 4.00						
Fall 2021 Law						
LAW	6057	Vineyard and Winery Law	3.00	A	12.00	
LAW	6222	Law Practice Technology	2.00	A	8.00	
LAW	6249	Crimes in IP & Info. Law	2.00	B	6.00	
LAW	7101	Journal of Biosecurity	1.00	CR	0.00	
Ehrs: 8.00 GPA-Hrs: 7.00 QPts: 26.00 GPA: 3.71						

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Spring 2022 Law						
LAW	6050	Patent Law	3.00	A	12.00	
LAW	6416	Evidence	4.00	A	16.00	
LAW	6435	Business Entities	4.00	A	16.00	
LAW	7005	Texas Bank Lawyer	1.00	CR	0.00	
LAW	7101	Journal of Biosecurity	1.00	CR	0.00	
Ehrs: 13.00 GPA-Hrs: 11.00 QPts: 44.00 GPA: 4.00						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	84.00	80.00	307.00	3.83
TOTAL TRANSFER	12.00	0.00	0.00	0.00
OVERALL	96.00	80.00	307.00	3.83

********** END OF TRANSCRIPT **********

Page: 2

Unsecured * Unofficial

Janessa Walla

ASSISTANT DEAN OF ACADEMIC SERVICES AND REGISTRAR

OFFICE OF THE REGISTRAR - LUBBOCK, TEXAS 79409

3 digit course numbers changed to 4 digit numbers effective September 1983
Texas Technological College changed to Texas Tech University September 1, 1969

OFFICIAL CERTIFICATIONS BEAR REGISTRAR'S SIGNATURE WITH UNIVERSITY SEAL

Grant Coffey
3812 47th Street
Lubbock, Texas 79413
806.317.4408
grant_coffey@txnb.uscourts.gov

Writing Sample:

The following is an excerpt from a memo that I drafted for Judge Robert L. Jones. The memo is the basis for an order addressing a creditor's objections to the bankruptcy trustee's summary judgment evidence.

The bankruptcy case stems from chapter 11 petitions filed by related businesses, collectively referred to as the debtors.

The objections arose from a contentious adversarial proceeding where the bankruptcy trustee sought to claw back transfers made by the debtors to the creditor. The creditor filed a motion for summary judgment. In response, the trustee cited several groups of evidence, one group comprised the debtors' excel spreadsheets. Some spreadsheets were used to fraudulently obtain funds through organizing and perpetrating a check kiting scheme orchestrated by the debtors CFO. The creditor alleged that the spreadsheets were inadmissible hearsay and not business records under Rule 803(6) of the Federal Rules of Evidence. The creditor further argued the spreadsheets were not properly sponsored and were used for fraudulent purposes; thus, the records are unreliable.

The memo, at this stage, was edited by myself and Judge Jones's judicial assistant. For this writing sample, the memo is structurally edited to emphasize only the excel spreadsheets and not the other hearsay objections raised by the creditor. Additionally, upon Judge Robert L. Jones's request, the party names have been changed to represent their relationship to the case instead of their identity.

A. Admissibility of the Evidence

The creditor alleges several pieces of the trustee's summary judgment evidence inadmissible hearsay.[1] Inadmissible evidence cannot be considered on a motion for summary judgment because inadmissible evidence "would not establish a genuine issue of material fact if offered at trial." *Renfroe v. Parker*, 974 F.3d 594, 598 (5th Cir. 2020) (quotation omitted). "[T]he summary judgment evidence need not be 'in a form that would be admissible at trial[.]'" *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986)).[2]

Hearsay is an out-of-court statement being offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). In general, evidence that is hearsay is not admissible unless the evidence falls within an exclusion or exception to the hearsay prohibition. Fed. R. Evid. 802. "Once a party has 'properly objected to [evidence] as inadmissible hearsay,' the burden shifts to the proponent of the evidence to show, 'by a preponderance of the evidence, that the evidence [falls] within an exclusion or exception to the hearsay rule and was therefore admissible." *Loomis v. Starkville Miss. Pub. Sch. Dist.*, 150 F. Supp. 3d 730, 742-43 (N.D. Miss. 2015) (internal citations omitted).

The creditor objects to the debtors' internal excel files.

i. Business Records Exception

The trustee argues that the debtors' excel sheets and employee emails fall within the business records exception to hearsay. Fed. R. Evid. 803(6). The creditor argues that the emails and excel sheets are not admissible because the trustee has not shown the creators had an

[1] The creditor objects to the debtors' CFO's testimony, the factual resumes of criminal proceedings against the debtors' employees, emails between the debtors' employees, and excel spreadsheets used in the debtors' fraud.
[2] For example, the court may consider testimony by affidavit that might not otherwise be admissible at trial. *Thomas v. Atmos Energy Corp.*, 223 F. App'x 369 (5th Cir. 2007).

obligation to create the documents and has not properly authenticated that the documents have been created for business purposes. To admit the documents as business records under Rule 803(6), the documents or records (i) must have been made at or near the time by someone with knowledge, (ii) kept in the ordinary course of business, (iii) made in a regular practice, and (iv) these elements must be shown by the testimony of the custodian or a qualified witness, then (v) the opponent may show the evidence lacks trustworthiness.

1. Excel Sheets

The creditor alleges that the excel sheets are not admissible under Rule 803(6) because they have unknown authors, no witness sponsored the documents, and were part of the debtors' fraud. Speaking to the authorship and sponsoring of the evidence, courts have found that a trustee can "establish [the business record] requirements through 'the testimony of the custodian or another qualified witness,' or by means of an out-of-court certification procedure established by rule or statute." *Curtis v. Perkins*, 781 F.3d 1262, 1267 (11th Cir. 2015) (citations omitted). Additionally, courts have held that the trustee's testimony is sufficient to authenticate the requirements of Rule 803(6) when the trustee's testimony is presented with enough circumstantial evidence to establish the trustworthiness of the documents. *Curtis*, 781 F.3d at 1268-69; *United States v. Flom*, 558 F.2d 1179, 1182 (5th Cir. 1977) ("the law is clear that under circumstances which demonstrate trustworthiness it is not necessary that the one who kept the record, or even had supervision over their preparation, testify"). Here, the trustee relies on the collection method, electronic records, interviews with employees, and a witness's deposition to conclude that the excel sheets were created and used in the ordinary course of debtors' business. ECF No. 288-1, Pl.'s Ex. B at App. 786; ECF 342-5, Pl.'s Ex. B at App. 1720.

Moreover, fraudulent activity does not preclude a business's records from being business records. *See United States v. Kaiser*, 609 F.3d 556, 575-76 & n.6 (2nd Cir. 2010). "The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." Fed. R. Evid. 803 advisory committee's note to Rule803(6).

Here, the debtors' employees routinely relied on the spreadsheets. An example is an exhibit[3] discussed in a witness's deposition—the exhibit is a spreadsheet documenting the debtors' check kiting. ECF No. 342-1 at App. 204, and 206:15-18. The witness describes the spreadsheet as "the daily intercompany spreadsheet, and it shows basically the amount coming from each dealership payable to which dealership it's payable to." *Id.* at App. 205. In the spreadsheet, the debtors' CFO directs the amount of money to deposit at each bank. *Id*. at App. 208. Employees then would deposit the requested amount in the specified bank account. The purpose of the documents was to perpetuate a check-kiting scheme, but the reliability of the documents is evidenced by the employee's reliance on the documents.

Ultimately, the Court should find that the excel sheets fall within the Rule 803(6) exception to hearsay because the debtors' employees relied upon the documents in the ordinary course of business and were appropriately sponsored by the trustee.

[3] ECF No. 337-9 at App. 2515-18 (Exhibit F-16).

Applicant Details

First Name	**Emily**
Last Name	**Duckworth**
Citizenship Status	**U. S. Citizen**
Email Address	**emily_duckworth1@baylor.edu**
Address	**Address** Street **9900 China Spring Rd, Apt 608** City **Waco** State/Territory **Texas** Zip **76708-5750** Country **United States**
Contact Phone Number	**903-830-4538**

Applicant Education

BA/BS From	**University of Texas-Austin**
Date of BA/BS	**May 2021**
JD/LLB From	**Baylor University School of Law** **http://www.baylor.edu/law/**
Date of JD/LLB	**April 27, 2024**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Baylor Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**American Bar Association National Appellate Advocacy Competition, Brief Writer** **Earle E. Zehmer Workers' Compensation Moot Court Competition, Brief Writer** **Appellate Lawyers Association Moot Court Competition, Brief Writer**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Serr, Brian
brian_serr@baylor.edu
254-710-4690
Asbridge, Jessica
Jessica_Asbridge@baylor.edu
2547103985

This applicant has certified that all data entered in this profile and any application documents are true and correct.

EMILY DUCKWORTH

9900 China Spring Road, Apartment 608, Waco, Texas 76708
emily_duckworth1@baylor.edu
(903) 830-4538

June 11, 2023

The Honorable David S. Morales
United States District Court
1133 N. Shoreline Blvd.
Corpus Christi, Texas 78401

Dear Judge Morales:

I am a rising third-year student at Baylor University School of Law, and I am writing to apply for a clerkship in your chambers during the 2024-2025 term. As a lifelong resident of Texas, I am hoping to secure a clerkship in the Southern District. Though I don't have particularly strong ties to South Texas, I am pursuing clerkships that will expose me to new regions of this great state.

Throughout law school, I have developed certain skills that will allow me to contribute substantively to your chambers. As a judicial intern, I sharpened my legal research abilities by resolving complex procedural issues on which there were no controlling authorities. My legal writing also improved through participating extensively in the drafting and revising process with my supervising law clerk. Moreover, this past spring, I served as a brief writer for Baylor's American Bar Association National Appellate Advocacy Competition Team. As such, I researched and wrote an appellate brief on whether the First Amendment protects a professor's classroom speech in a public university. Thus, the competition enabled me to exercise my writing skills within a competitive setting.

I have also had the honor of serving as a technical editor for Baylor Law Review. As a technical editor, my attention to detail has improved by teaching associate editors about proper citation forms and reviewing their changes. These experiences have transformed my research and writing abilities in a manner that I believe will allow me to be a positive addition to your chambers.

I have submitted my resume highlighting my most recent academic and service-oriented endeavors, a writing sample, and the requisite transcripts. Also enclosed are letters of recommendation from Professors Jessica Asbridge (254-710-3985) and Brian Serr (254-710-1911). I hope to discuss this opportunity further and thank you in advance for your time and consideration.

Respectfully,

Emily Duckworth

EMILY DUCKWORTH

9900 China Spring Road, Apartment 608, Waco, Texas 76708
emily_duckworth1@baylor.edu
(903) 830-4538

EDUCATION

Baylor University School of Law Waco, TX
Juris Doctor Candidate, April 2024
GPA: 3.71 | Class Standing: 12 out of 198 (Top 6%)

Activities: Baylor Law Review, *Technical Editor*
American Bar Association National Appellate Advocacy Competition, *Brief Writer*
Zehmer National Workers' Compensation Moot Court Competition, *Brief Writer*
Appellate Lawyers Association Moot Court Competition, *Brief Writer*

Honors: High A in Conflicts of Law
High A in Criminal Procedure
High A in Legal Analysis, Research, and Writing III
Dean's List – Fall 2021, Winter 2021, Spring 2022, Fall 2022, Winter 2022, Spring 2023
Faegre Drinker Spring 2022 Moot Court Competition Semi-Finalist

Organizations: Baylor Public Interest Legal Society
Baylor Barrister Society

University of Texas at Austin Austin, TX
Bachelor of Arts in Government, Certificate in Business Spanish, May 2021
GPA: 3.9 | Class Standing: Top 20%

Honors: Graduation with Honors
Dean's List – Spring 2020, Fall 2020, Spring 2021
Honors Day College Scholar

EXPERIENCE

Polsinelli, PC Dallas, TX
Summer Associate, May 2023 – July 2023
Organized and created firm resources; researched and drafted memorandums regarding asset forfeiture proceedings, indemnification provisions, and expert witness testimony

Baylor University School of Law Waco, TX
Research Assistant to Professor Jessica Asbridge, July 2022 – August 2022
Researched and surveyed circuit authority on a specific issue for a larger article regarding the private nondelegation doctrine; wrote a legal memo explaining the findings of that research

Hon. Marcia Crone, U.S. District Court for the Eastern District of Texas Beaumont, TX
Judicial Intern, May 2022 – July 2022
Drafted judicial orders; researched complex legal issues; recommended outcomes for civil and criminal motions based on my research; received and incorporated edits from my superiors; observed civil and criminal hearings

The University of Texas at Austin Austin, TX
Research Intern, January 2021 – May 2021
Coded and organized information from a compiled list of articles regarding self-immolation and hunger strikes in the Middle East and Asia

LANGUAGE

Spanish, Proficient

(/StudentSelfService/)

Emily Duckworth

Student Academic Transcript

Academic Transcript

Transcript Level

Law

Transcript Type

Web Transcript

Student Information | Degree Awarded : | Institution Credit | Transcript Totals | Course(s) in Progress

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Student Information

Birth Date

April 28, 2000

Curriculum Information

Academic Program: : Juris Doctor

College

Law School

Major and Department

Law, Law

Degree Awarded :

Sought

Juris Doctor

Major

Law

Institution Credit

Term : Fall 2021

College

Law School

Additional Standing

Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	9101	LW	LARC: Intro to Legal Writ, Pt1	A	2.000	8.00	
LAW	9405	LW	Civil Procedure	A	4.000	16.00	
LAW	9407	LW	Contracts 1	B	4.000	12.00	
LAW	9413	LW	Torts 1	A	4.000	16.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	14.000	14.000	14.000	14.000	52.00	3.71
Cumulative	14.000	14.000	14.000	14.000	52.00	3.71

Term : Winter 2021

College

Law School

Additional Standing

Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	9103	LW	LARC: Intro to Legal Writ, Pt2	A-	1.000	3.67	
LAW	9303	LW	Criminal Law	A-	3.000	11.01	

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	9314	LW	Torts 2	B+	3.000	9.99	
LAW	9408	LW	Contracts 2	A-	4.000	14.68	
LAW	9411	LW	Property 1	A	4.000	16.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	15.000	15.000	15.000	15.000	55.35	3.69
Cumulative	29.000	29.000	29.000	29.000	107.35	3.70

Term : Spring 2022

College

Law School

Additional Standing

Dean's List

Term Comments

High A in LARC 3: Per suasive Communicat ion Sec. 04

High A in Criminal Pr ocedure Sec. 01

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	9203	LW	LARC 3: Persuasive Comm	A	2.000	8.00	
LAW	9301	LW	Constitutional Law: Ind Libert	A-	3.000	11.01	
LAW	9312	LW	Property 2	A	3.000	12.00	
LAW	9356	LW	Criminal Procedure	A	3.000	12.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	11.000	11.000	11.000	11.000	43.01	3.91
Cumulative	40.000	40.000	40.000	40.000	150.36	3.75

Term : Summer 2022

College

Law School

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	9294	LW	Federal Jud Field Placement	P	3.000	0.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	3.000	3.000	3.000	0.000	0.00	
Cumulative	43.000	43.000	43.000	40.000	150.36	3.75

Term : Fall 2022

College

Law School

Additional Standing

Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	9207	LW	Tax & Acct Principles for Lawy	B	2.000	6.00	
LAW	9504	LW	Trusts & Estates	B+	5.000	16.66	
LAW	9521	LW	Business Organizations 1	A-	5.000	18.35	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	12.000	12.000	12.000	12.000	41.01	3.41
Cumulative	55.000	55.000	55.000	52.000	191.38	3.68

Term : Winter 2022

College

Law School

Additional Standing

Dean's List

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	9104	LW	LARC 4: Transactional Drafting	A	1.000	4.00	
LAW	9258	LW	Products Liability	A-	2.000	7.34	
LAW	9308	LW	Sales Trans:Domestic & Int Law	A	3.000	12.00	
LAW	9362	LW	Employment Discrimination	B+	3.000	9.99	
LAW	9401	LW	Con Law: Structure, Pwr & Leg	A	4.000	16.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	13.000	13.000	13.000	13.000	49.33	3.79
Cumulative	68.000	68.000	68.000	65.000	240.72	3.70

Term : Spring 2023

College	Additional Standing	Term Comments
Law School	Dean's List	High A in Conflict of Laws

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	9105	LW	LARC 5: Litigation Drafting	B	1.000	3.00	
LAW	9118	LW	Transactional Law Practice Lab	A	1.000	4.00	
LAW	9324	LW	Complex Litigation	A	3.000	12.00	
LAW	9326	LW	Remedies	B+	3.000	9.99	
LAW	9333	LW	Advanced Legal Research	A-	3.000	11.01	
LAW	9383	LW	Conflict of Laws	A	3.000	12.00	
LAW	9V10	LW	Advocacy Team	A	2.000	8.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	16.000	60.00	3.75
Cumulative	84.000	84.000	84.000	81.000	300.73	3.71

Transcript Totals

Transcript Totals - (Law)	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution	84.000	84.000	84.000	81.000	300.73	3.71
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.00

Course(s) in Progress

Term : Fall 2023

College

Law School

Subject	Course	Level	Title	Credit Hours
LAW	9229	LW	Professional Responsibility	2.000
LAW	9520	LW	Practice Court 2:Trial Evidenc	5.000
LAW	9527	LW	Practice Court 1: Pretrial Pra	5.000
LAW	9529	LW	Practice Court Lab	0.000

EMILY DUCKWORTH

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WRITING SAMPLE

As a brief writer for the ABA National Appellate Advocacy Competition, I drafted the attached brief for the regional competition in Los Angeles. The selected excerpt advocates that the First Amendment should not protect a public university professor's classroom speech. The concern is that such protection would allow professors free reign to indoctrinate students to extreme ideologies while hiding behind First Amendment protections that are unavailable to other public employees and professors at private universities.

I. A PROFESSOR'S CLASSROOM SPEECH SHOULD NOT RECEIVE FIRST AMENDMENT PROTECTION BECAUSE IT IS SPEECH MADE PURSUANT TO HIS OFFICIAL DUTIES AS A PUBLIC EMPLOYEE.

Despite the broad protection afforded to freedom of speech under the First Amendment, such freedom is not absolute. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see Pickering v. Bd. Of Educ.*, 391 U.S. 563, 568 (1968). A state has an increased interest in regulating the speech of public employees. *Id.* Accordingly, a state can impose far greater restrictions on a public employee's speech than it can on the speech of private individuals. *Id.*; *Waters v. Churchill*, 511 U.S. 661, 671 (1994). Nevertheless, a public employee does not lose all his constitutional protections as a condition of his employment. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). Thus, a question arises as to the appropriate manner for determining when a public employee's speech is protected by the First Amendment.

This Court in *Pickering v. Board of Education* and *Garcetti v. Ceballos* established the ultimate framework for evaluating a restriction on a public employee's speech. Accordingly, a court must first ask whether the public employee spoke pursuant to his official job duties. *Garcetti*, 547 U.S. at 421. If answered in the affirmative, the speech is classified as government speech, and

constitutional protections do not apply. *See id.* If answered in the negative, then the court must apply the balancing test announced in *Pickering*, which weighs the public employer's interest in promoting efficient services against the employee's interest in commenting as a citizen on matters of public concern. *Pickering*, 391 U.S. at 568.

As such, *Garcetti* established that speech made pursuant to a public employee's official job duties falls outside the scope of First Amendment protection. However, the Court explicitly left open the question of whether *Garcetti* should apply in the context of a public university professor's classroom speech. *Id.* at 425. The Court was concerned that such an extension might infringe on a professor's academic freedom. Nevertheless, this Court should extend *Garcetti* for two reasons. First, the rationale enunciated in *Garcetti* applies with equal, if not greater, force in the academic setting. Second, constitutionally protected academic freedom is an institutional right rather than an individual one.

A. *GARCETTI* SHOULD APPLY TO A PROFESSOR'S CLASSROOM SPEECH BECAUSE THE JUSTIFICATIONS FOR THE RULE ANNOUNCED IN *GARCETTI* ARE EQUALLY PERSUASIVE IN THE ACADEMIC CONTEXT.

Garcetti should apply to a professor's classroom speech because the Court's rationale is even more persuasive in the academic setting. The Court in *Garcetti* offered three justifications for its holding:

(1) restricting speech made according to a public employee's official duties does not infringe on any liberties that he would have enjoyed as a private citizen;

(2) employers have a heightened interest in controlling the professional speech of a public employee because of the official consequences created by such speech; and

(3) judicial supervision should not displace an employer's managerial discretion. *Garcetti*, 547 U.S. at 421–23.

Expanding on the first justification, the Court held that restricting a public employee's speech pursuant to his official duties does not infringe on any liberties that the employee would

have enjoyed as a private citizen. *Id.* at 421. Instead, the restrictions merely reflect an employer's exercise of control over the speech it has created. *Id.*

Analogously, when a public college restricts a professor's classroom speech, it exercises control over the speech it created. An essential purpose of a professor's official duties is to educate his students, a task necessarily involving speech. *See Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007). Additionally, a university's decision to hire a professor requires it to evaluate and ultimately employ the professor's speech. *Id.* Thus, a professor's classroom speech is an indispensable core of his professional duties. *See id.* Accordingly, when a public college exercises control over that speech, it is merely regulating the speech it created.

Furthermore, public colleges must constantly make value determinations based on a professor's speech. *Webb v. Bd. Of Trs. Of Ball State Univ.*, 167 F.3d 1146, 1150 (7th Cir. 1999). These determinations arise anytime a professor is evaluated for a promotion, demotion, or termination. *See id.* Furthermore, a professor's speech is considered for something as simple as deciding what courses a professor should be assigned. *See id.* Because the educational institution has the sole discretion to make those decisions, a professor cannot demand to teach a specific course or deviate from a specified curriculum. *See Edwards v. Cal. Univ. of Penn.*, 156 F.3d 488, 491 (3d Cir. 1998) (acknowledging that public university professor's do not have a First Amendment right to decide what will be taught in the classroom). Therefore, regulating a professor's classroom speech does not infringe upon any rights that the professor would have enjoyed as a private citizen.

The second justification in *Garcetti* was that the government, as an employer, has a heightened interest in controlling the speech made by an employee in their professional capacity.

547 U.S. at 422. The Court reasoned that there is a need for substantive consistency and clarity due to the official consequences associated with official speech. *Id.*

Similarly, a public college has a heightened interest in controlling its professor's classroom speech because of the significant consequences associated with a professor's official speech. *See Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) (recognizing the importance of allowing school officials to regulate speech to further the school's educational mission). Arguably, the academic context enhances the consequences as it directly affects the college's ability to provide a well-rounded education to young and impressionable minds.

Public colleges are essential in training students to participate in our society. A professor helps formulate how these young minds perceive and move throughout the world. Additionally, colleges are essential in teaching students to evaluate information, think critically, and reach an independent conclusion. Accordingly, there can be extreme consequences to allowing narrow-minded speech to invade the classroom under the guise of free expression.

When examining Professor Smith's speech, such consequences become apparent. When discussing "cancel" culture, Professor Smith did not encourage students to think critically about why "cancel" culture has gained traction in recent years. Record at 5. Rather, he fervently advocated against "cancel" culture and explained that it softened society. R. at 5. As an apparent authority, his failure to represent both sides of the issue could lead students to unabashedly reject "cancel" culture without careful consideration or critical thought. Therefore, Smith's speech could produce significant consequences for his students.

Furthermore, Smith chose a painful topic that personally affected the students at Westland Community College ("WCC"). R. at 5–6. Applying the Socratic method, Smith asked questions that forced students to advocate for a man accused of sexually assaulting their peers. R. at 5–6.

Despite visual discomfort and protest, Smith persisted in his discussion. R. at 5–6. In response, the WCC administration reasonably concluded that the harm perpetuated by Professor Smith's discussion diminished the educational value to the students. Therefore, the consequences of Smith's official speech and the need to avoid these consequences via regulation are readily apparent.

However, the consequences associated with Professor Smith's speech do not even scratch the surface of the harm that would be created by restricting a college's ability to control the message conveyed in its classrooms. Take, for example, a history professor who insists on teaching a Eurocentric version of history that promotes colonialism while diminishing the harms perpetrated by the triangle slave trade. Or an economics professor who touts a Marxist approach as the supreme economics theory. Allowing a professor's speech to reign unchecked would threaten to transform university classrooms from an educational environment into a platform for a professor's personal indoctrination scheme.

Regarding the third justification, this Court stated that judicial supervision should not circumvent a public employer's managerial discretion. *Garcetti*, 547 U.S. at 423. Judicial supervision of academic decision-making is undesirable for two reasons. First, courts are not properly equipped to make academic evaluations integral to the operation of an educational institution. Second, a public college cannot efficiently serve the public if it is constantly entangled in extensive and costly litigation.

A college must decide which classes it will teach, what curriculum it will adopt, and the appropriate lecturer for each course. These determinations inherently involve expert evaluations that consider various professional and field-based standards. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985). A Department Chair or a Dean has the necessary expertise to

make these decisions. They are deeply entrenched in the educational standards of their profession and are equipped to determine who and what will meet the needs of their students.

In contrast, the judiciary is unfamiliar with the intricacies of each department within an educational institution. *See Bishop*, 926 F.2d at 1075 (noting that federal judges should not replace deans or educators). Hence, there is a need to prevent the judicial usurpation of power over managerial decisions best suited for the educational institution.

Furthermore, a public college cannot efficiently serve the public when there exists extensive judicial supervision. As previously mentioned, public colleges constantly evaluate professors based on their speech. *Webb*, 167 F.3d at 1150. Judicial supervision of these evaluations will hinder the college's ability to provide students with a quality education. When faced with costly litigation, universities will hesitate to make the best decisions for their students.

Accordingly, this Court should extend *Garcetti* to academia because the policy justifications behind its holding are equally, if not more, persuasive considering the unique circumstances surrounding public employment by an educational institution.

B. *GARCETTI* SHOULD APPLY TO A PROFESSOR'S CLASSROOM SPEECH BECAUSE ANY FIRST AMENDMENT RIGHT TO ACADEMIC FREEDOM IS AN INSTITUTIONAL RIGHT RATHER THAN AN INDIVIDUAL ONE.

Notwithstanding the support found in *Garcetti* for excluding classroom speech from constitutional protection, there remains a question as to whether a professor has a protected right to academic freedom under the First Amendment that would preclude the extension of *Garcetti*. 547 U.S. 425. This Court should answer in the negative for two reasons. First, the Court has not clearly defined the right to academic freedom. Second, to the extent that the Court has recognized a constitutionally protected right to academic freedom, it has been an institutional right.

Despite the Court's general recognition of a right to academic freedom, it has never clearly demarcated the contents of that right. J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L.J. 251, 288 (1989) (stating that Supreme Court cases recognizing a First Amendment right to academic freedom have been few and vague). Rather the Court has simply conveyed respect for academic freedom as an ideal that is loosely connected to the First Amendment. *See Urofsky v. Gilmore*, 213 F.3d 401, 412 (4th Cir. 2000).

Moreover, the Court has never set aside a state regulation for infringing on a constitutionally protected right to academic freedom, and it recognized within the last year that such a right had not been definitively established. *Id.*; *Kennedy*, 142 S. Ct. at 2424 (acknowledging that academic freedom "may or may not" implicate additional First Amendment protections). Consequently, the court need not and should not establish an individual right to academic freedom now based on such uncertain precedent.

To the extent that the Court has addressed a First Amendment right to academic freedom, the right has been institutional rather than individual. There are two types of academic freedom. Byrne, *supra*, at 254. Academic freedom, as understood in the professional world, means the liberties claimed by professors as individuals against administrative or political interference with research, teaching, and governance by nonacademic individuals or entities. *Id.* at 255. In contrast, academic freedom as a constitutional norm refers to the insulation of the educational institution from political interference. *Id.*

Because the Constitution often limits governmental power, it can be challenging to conceptualize constitutional protection of a governmental entity's rights. *See id.* at 300. However, the institutional right to academic freedom arose from the historical need to protect public colleges from political interference at a time when it was subject to extensive federal regulations. *See id.*

Accordingly, constitutional academic freedom focuses on the institutional right to determine "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 236 (1957).

Furthermore, this Court has explicitly recognized that the First Amendment does not require the educational institution to allow professors to participate in institutional policymaking. *See Minnesota State Bd. For Cmty. Colls.*, 465 U.S. at 287. The Court recognized a difference between the professional tradition of faculty participation in school governance and the constitutional protection of that tradition; thus, further establishing the distinction between professional and constitutional academic freedom. *See id.*

This Court has also recognized that the constitutional right to academic freedom protects the university's interest in determining the content of the education they provide. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). The Court reasoned that the message conveyed within a university classroom is the university itself speaking. *Id.* Therefore, the Court emphasized that the right to academic freedom protected the university's autonomy over the message conveyed within its classrooms. *Id.*

Applying *Garcetti* to a professor's classroom speech would promote the institution's freedom to determine what may be taught and how it may be taught by removing any First Amendment implications from those decisions. Moreover, it would be consistent with this Court's recognition of the institutional right to academic freedom. Accordingly, the principle of academic freedom supports, rather than precludes the application of *Garcetti* to public employment in academia.

Applicant Details

First Name	**Maximiliano**
Last Name	**Elizondo**
Citizenship Status	**U. S. Citizen**
Email Address	**melizondo17@mail.stmarytx.edu**
Address	**Address** Street **1915 Broadway Street** City **San Antonio** State/Territory **Texas** Zip **78215** Country **United States**
Contact Phone Number	**3618151984**

Applicant Education

BA/BS From	**Baylor University**
Date of BA/BS	**May 2021**
JD/LLB From	**St. Mary's University School of Law** **https://law.stmarytx.edu/**
Date of JD/LLB	**May 18, 2021**
Class Rank	**10%**
Law Review/Journal	**Yes**
Journal(s)	**St. Mary's Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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Lampley1
Garza, Chris
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Maximiliano Elizondo

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melizondo17@mail.stmarytx.edu | (361) 815-1984

June 10, 2023

The Honorable District Judge David Steven Morales
United States District Courthouse
1133 North Shoreline Boulevard
Corpus Christi, TX 78401

Dear Judge Morales

I write to submit my application for a 2024–25 clerkship in your chambers. I am a 2L at St. Mary's University School of Law, where I am the Editor in Chief of the *St. Mary's Law Journal*. I earned my B.A. from Baylor University. I am a native Corpus Christi who has been fortunate enough to intern in the Texas Southern District Court of Corpus Christi this summer. I have an intense interest in asset protection and plan on pursuing a career in the field following a clerkship.

In law school, I have maximized my opportunities to research, write, and learn about different areas of the law. On the *Law Journal*, I edited four articles. One required researching international law. For this assignment, I examined Nigerian and Kenyan constitutional law and researched how these legal systems addressed the rights of internally displaced persons. I also drafted a journal comment on the ethical responsibilities of personal injury attorneys. The comment discusses how lower fee arrangements may reduce the effort a personal injury lawyer expends on a case and the ethical implications of such conduct. Further, as a research assistant, I edited and cite-checked multiple chapters of *Federal Evidence Tactics*. I have also taken an advanced legal seminar, in which I drafted a detention order, a suppression order, and a proposed judicial opinion for a prisoner civil rights case. Combined, these research and writing opportunities have challenged me to think critically about different legal issues. I believe they have adequately prepared me to be a law clerk.

I also believe my work ethic and ability to multitask will make me a value-add to your chambers. I am constantly working on multiple projects, and I consistently complete them with efficiency. As Editor in Chief of the *Law Journal*, I manage the production of four different issues, oversee several large-scale events, and ensure our members comply with our bylaws. I recognize the importance of being organized, which is essential to meeting deadlines and maintaining my grades. Accordingly, I believe my sense of professional integrity will make me an effective and reliable law clerk.

Enclosed are my resume, list of references, writing sample, and transcript. If you need additional information, please reach me by phone at (361) 815-1984 or email at melizondo17@mail.stmarytx.edu. Thank you for your time and consideration.

Respectfully,
Maximiliano Elizondo

Maximiliano Elizondo

1915 Broadway Apt. 337, San Antonio, Texas, 78215
melizondo17@mail.stmarytx.edu | (361) 815-1984

EDUCATION

St. Mary's University School of Law — San Antonio, TX
J.D. Candidate, expected 2024 — 2021 – Present
Rank: Top 5.5% (13/233); GPA: 3.67/4.0
Journal: Editor in Chief, *St. Mary's Law Journal* (Vol. 55)
Honors: Dean' List (top 10%): Fall 2021 & 2022
Faculty Award (highest exam score): Wills, Estates, and Trusts
Staff Editor Excellence Award
Publication: Comment, *The Impact the Monetary Value of a Case Has on Effort and Productivity Within the Field of Personal Injury*, 14 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS — (forthcoming 2024)
Activities: St. Mary's Criminal Law Association
Hispanic Law Students Association

Baylor University, Waco, Texas
B.A., Political Science; Minor: History — Waco, TX
Study Abroad: Studied French in Paris, France — 2017 – 2021

EXPERIENCE

United States District for the Southern District of Texas — San Antonio, TX
Incoming Intern for the Hon. U.S. Magistrate Judge Julie Hampton — Summer 2023

United States District Court for the Western District of Texas — San Antonio, TX
Incoming Intern for the Hon. U.S. District Judge Jason Pulliam — Summer 2023

St. Mary's School of Law – Associate Dean Ramona L. Lampley — San Antonio, TX
Research Assistant — Winter 2022 – Present

- Researched reports published by the Federal Rules of Evidence Advisory Committee.
- Assisted with drafting and revising chapters of Dean Lampley's book, *Federal Evidence Tactics*.
- Reviewed case law and edited articles discussing car privacy and vehicle financing for military members.

Gowan Elizondo LLP — Corpus Christi, TX
Law Office Intern — Summer 2022

- Researched case law on the liability of ambulance operators and negligent patient transfers.
- Formulated motions, demand letters, and petitions.
- Drafted a response to a motion for summary judgment, which argued a claim for *respondeat superior* liability should proceed to trial.

Law Office of Scott M. Ellison – Scott Ellison — Corpus Christi, TX
Law Office Intern — Summer 2020

- Observed criminal proceedings and discussed legal theory with supervising attorney.

INTERESTS & VOLUNTEER ACTIVITIES

- Weightlifting, reading western and horror novels, and painting miniature figures.
- SNIPSA Volunteer – Assist in puppy bathing, dog walking, and instrument cleaning. Volunteer approximately 3-6 hours per week.

ST.MARY'S UNIVERSITY | gateway SELF SERVICE

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ST.MARY'S UNIVERSITY One Camino Santa Maria San Antonio, Texas 78228

S00713040 Maximiliano D. Elizondo
Jun 09, 2023 03:57 pm

Academic Transcript

This is not an official transcript. Courses which are in progress may also be included on this transcript.

"R" column denotes repeated course at St.Mary's University:

E = course was excluded from GPA calculation (lower grade)

I = course was included in GPA calculation (higher grade)

Institution Credit Transcript Totals Courses in Progress

Transcript Data

STUDENT INFORMATION

Name : Maximiliano D. Elizondo

Curriculum Information

Primary Program
Program: Juris Doctorate
Major and Department: Law, Law Department

***Transcript type:Gateway Transcript is NOT Official ***

DEGREE AWARDED

Sought: Juris Doctorate **Degree Date:**

Curriculum Information

Program: Juris Doctorate
Major: Law

INSTITUTION CREDIT -Top-

Term: Fall 2021

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LW	6335	LW	LCAP I	B	3.000	9.00	
LW	6477	LW	Federal Civil Procedure I	A-	4.000	14.68	
LW	6478	LW	Torts	A	4.000	16.00	
LW	6490	LW	Contracts	A	4.000	16.00	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	15.000	55.68	3.71
Cumulative:	15.000	15.000	15.000	15.000	55.68	3.71

Unofficial Transcript

Term: Spring 2022

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LW	6336	LW	LCAP II	B-	3.000	8.01	
LW	6341	LW	Criminal Law	B	3.000	9.00	
LW	6440	LW	Constitutional Law	A	4.000	16.00	
LW	6480	LW	Property	A-	4.000	14.68	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	14.000	47.69	3.41
Cumulative:	29.000	29.000	29.000	29.000	103.37	3.56

Unofficial Transcript

Term: Fall 2022

Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LW	6705	LW	Jurisprudence:Gender & The Law	B	3.000	9.00	
LW	7230	LW	Law Journal - Staff Writer	P	2.000	0.00	
LW	7308	LW	Voting Law	A-	3.000	11.01	
LW	7427	LW	Wills, Estates, and Trusts	A	4.000	16.00	
LW	8318	LW	Mortgages & Real Estate Financ	A	3.000	12.00	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	13.000	48.01	3.69
Cumulative:	44.000	44.000	44.000	42.000	151.38	3.60

Unofficial Transcript

Term: Spring 2023

Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LW	6200	LW	Adv Legal Wrtng Federal Clerks	B+	2.000	6.66	
LW	6434	LW	Evidence	A	4.000	16.00	
LW	7310	LW	Business Associations	A	3.000	12.00	
LW	7505	LW	Law Journal Staff Writer	P	1.000	0.00	
LW	7629	LW	Animal Law	A-	2.000	7.34	
LW	8745	LW	International Human Rights	A	3.000	12.00	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	14.000	54.00	3.86
Cumulative:	59.000	59.000	59.000	56.000	205.38	3.67

Unofficial Transcript

TRANSCRIPT TOTALS (LAW) -Top-

Level Comments: Other Colleges Attended Graduated BA May 2021 Baylor University - Waco, Texas

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	59.000	59.000	59.000	56.000	205.38	3.67
Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	59.000	59.000	59.000	56.000	205.38	3.67

Unofficial Transcript

COURSES IN PROGRESS -Top-

Term: Fall 2023

Subject	Course	Level	Title	Credit Hours
LW	6333	LW	Professional Responsibility	3.000
LW	7331	LW	Family Law	3.000
LW	7375	LW	Constitution Criminal Procedure	3.000
LW	7694	LW	Sales	2.000
LW	8391	LW	Estate Planning	3.000
LW	8607	LW	Law Journal Editorial Board	2.000

Unofficial Transcript

[Financial Aid Eligibility Menu]

Maximiliano Elizondo

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WRITING SAMPLE

This 11-page writing sample is a proposed judicial opinion I drafted for an advanced legal writing seminar. The opinion addresses whether a border patrol agent had reasonable suspicion to conduct a roving patrol stop.

My instructor provided the class with an outline with pre-written headings. Additionally, another student conducted a required peer review of the draft and a teaching assistant provided feedback on concision and other stylistic matters. My initial draft and revisions are entirely my own writing.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF TEXAS
OAK TREE DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	
VS.	§	CRIMINAL ACTION NO. X:XX-XX-XXXX
	§	
	§	
ALEXANDER DAVID SMITH	§	

ORDER

Defendant has filed a motion to suppress, and the Government has filed a response (Dkt. Nos. 28, 32). Having reviewed the arguments and applicable authority, the Court finds the motion to suppress (Dkt. No. 28) is **DENIED.**

I. BACKGROUND

A. Procedural History

Defendant was indicted for both conspiring to transport and actually transporting undocumented aliens. *See* 8 U.S.C. § 1324(a)(1)(A)(ii); § 1324(v)(I); (Dkt. No. 19). The Defendant filed a Motion to Suppress arguing the stop leading to his arrest was unconstitutional (Dkt. No. 28 at 7). Defendant argues the arresting agent obtained the evidence during an illegal seizure and must be suppressed under the "fruit of the poisonous tree doctrine" (*id.*). The Government responded (Dkt. No. 32).

B. Factual Allegations

The Court held a suppression hearing, which established the following: On September 11, 2022, Border Patrol Agent Christopher Peterson patrolled a section of I-35 (*id.* at 11). During this patrol, a Department of Defense (DOD) stationed at mile

marker 27 spotted Defendant's vehicle (*id.* at 14). The DOD station notified Agent Peterson the vehicle was traveling north on the west access road (*id.*). Once the Defendant passed mile marker 31, Agent Peterson began following him (*id.* at 17). As Agent Peterson trailed Defendant, he made the following observations:

1. The Defendant drove a very clean suburban registered to a rental company in Oklahoma (*id.* at 17–18);
2. The Defendant seemed very tense; two hands on the wheel and arms locked out (*id.* at 17);
3. Local drivers typically waved when they passed officers (*id.* at 24). Defendant did not wave (*id.*);
4. Once the Defendant noticed Agent Peterson behind him, the Defendant slowed down to 20 miles below the speed limit (*id.* at 18);
5. The Defendant accelerated and created a significant distance between himself and the agent (*id.*). In order to reach the Defendant, Agent Peterson had to reach speeds of 105 miles per hour (*id.* at 20); and
6. The Defendant wove in and out of traffic (*id.).*

After Agent Peterson concluded the Defendant behaved suspiciously, he conducted a roving patrol stop (*id.* at 22).

II. LEGAL STANDARD

The Fourth Amendment governs whether a seizure is constitutional. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). A seizure is constitutional under the Fourth Amendment if it is "reasonable." *United States v. Brignoni-Ponce* 422 U.S. 873, 878 (1975). In

Brignoni-Ponce, the Supreme Court concluded "officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts" to warrant reasonable suspicion of illegal activity. *Id.* at 884. The reasonable suspicion standard "requires more than merely an unparticularized hunch, but considerably less than proof of wrongdoing by a preponderance of the evidence." *United States v. Garza*, 727 F.3d 436, 440 (5th Cir. 2013). *Brignoni-Ponce* enumerated the following eight factors to determine whether reasonable suspicion exists:

1. Proximity to the border;
2. Characteristics of the area;
3. Driver's behavior;
4. Usual traffic patterns;
5. Aspects of the vehicle;
6. Recent illegal activity; and
7. The arresting agent's previous experience; and
8. The appearance of passengers. *Brignoni-Ponce* 422 U.S. at 885–86.

Looking to the totality of the circumstances is essential for a reasonable suspicion determination. *Garza*, 727 F.3d at 440. Therefore, not every factor "need weigh in favor of reasonable suspicion" in order to meet the standard. *United States v. Zapata-Ibarra*, 212 F.3d 877, 884 (5th Cir. 2000). When an officer acts without a warrant, the Government has the burden of proving whether reasonable suspicion exists. *United States v. Waldrop*, 404 F.3d 365, 368 (5th Cir. 2005).

III. DISCUSSION

The Court finds Agent Peterson had a reasonable suspicion to conduct the roving patrol stop. Four of the eight *Brignoni-Ponce* factors weigh in favor of reasonable suspicion: proximity to the border, the driver's behavior, characteristics of the area, and aspects of the vehicle. Two factors weigh against a finding of reasonable suspicion: usual traffic patterns and the arresting agent's previous experience. The final two factors – recent illegal activity and appearance of the passengers – weigh neutrally because they were not taken into the agent's consideration in conducting the stop. The factors when viewed in their totality satisfy the reasonable suspicions standard.

A. Proximity to the Border

Proximity to the border is "a paramount factor in determining reasonable suspicion." *Zapata-Ibarra*, 212 F.3d at 881. This vital element asks whether the agent had "reason to believe that the vehicle had come from the border." *United States v. Lamas*, 608 F.2d 547, 549 (5th Cir. 1979). While there is no bright-line rule for this factor, generally "fifty miles from the border is . . . too far from the border to support an inference that it originated its journey there." *United States v. Jones*, 149 F.3d 364, 368 (5th Cir. 1998). Therefore, anything within fifty miles necessarily "implicates" the proximity factor. *Garza*, 727 F.3d at 441; s*ee United States v. Jacquinot*, 258 F.3d 423, 428 (stating the proximity element has been met if the agent observed the defendant's car within 50 miles of the border); *see also United States v. Villalobos*, 161 F.3d 285, 289 (concluding this factor has been satisfied when the vehicle is only thirty-six miles from the border). The stop here occurred approximately

thirty miles from United States-Mexico border (Dkt. No. 40 at 21). Therefore, this factor weighs in favor of reasonable suspicion.

B. Characteristics of the Area

In determining whether the "characteristics of the area" factor has been met, the Court looks to whether the road is known as a smuggling route. *Garza*, 727 F.3d at 441; *see United States v. Nichols*, 142 F.3d 857, 870 (5th Cir. 1998) ("It is well established that a road's reputation as a smuggling route adds to the reasonableness of the agents' suspicion.").

Agent Peterson testified that he had previous knowledge of smugglers using the west access road to circumvent the checkpoint (Dkt. No. 32 at 3). The Government argues the "characteristics of the area" factor weighs in favor of reasonable suspicion (*id.*). The Defendant states a route's reputation for smuggling alone is insufficient to establish reasonable suspicion (Dkt. No. 28 at 6). As the Court has already indicated though, there are multiple other factors weighing in favor of the Government. It would be inappropriate to view each factor within a vacuum because they must be viewed in the totality of the circumstances. *Garza*, 727 F.3d at 440; *see also United States v. Chavez-Chavez*, 205 F.3d 145, 148 (stating reputation is established when viewed in the light of other factors).

The Defendant cites multiple cases indicating a road's reputation for illegal activity is insufficient to justify a stop (Dkt. No. 28 at 6). But in all three of those cases, the Defendants were stopped more than 70 miles from the border. *See Chavez-Chavez*, 205 F.3d 145 at 148 ("The stop occurred 150 to 160 miles north of the border

. . .); *United States v. Diaz*, 977 F.2d 163, 165 (5th Cir. 2000); *see also Olivarez-Pacheco*, 633 F.3d at 403 (stating the stop occurred more than 200 miles from the border). As stated in the previous section, the proximity factor has been satisfied. Therefore, the roads reputation as an alien smuggling route satisfies the "characteristics of the area" factor and weighs it in favor of reasonable suspicion.

C. Driver's Behavior

The third factor analyzed in the Court's inquiry is driver behavior. *Brignoni-Ponce*, 422 U.S. at 885. The driver's behavior may raise a reasonable suspicion when his driving is erratic or when he attempts to evade the agent. *Id.* Agent Peterson indicated the following behavior was suspicious: (1) Defendant tapped on his brakes and drove 20 miles below the speed limit (Dkt. No. 40 at 18); (2) Defendant rapidly sped up when a tractor trailer pulled in front of Agent Peterson (Dkt. No. 32 at 4). This required the agent to reach speeds of 105 miles per hour to catch up (*id.*); and (3) Defendant wove in and out of traffic (Dkt. No. 40 at 21).

The Court finds the Defendant's driving behavior weighs in favor of reasonable suspicion. First, this Circuit has concluded deceleration is often innocent, but "such behavior may be suspicious if the driver was not speeding when first observed." *Jacquinot*, 258 F.3d at 429; *see Villalobos*, 161 F.3d at 291 ("We have held that noticeable deceleration in the presence of a patrol car can contribute to a reasonable suspicion, even though drivers often slow when they see law enforcement personnel."). Here, the agent gave no testimony indicating the Defendant was speeding prior to decelerating. Therefore, deceleration aids in a finding of reasonable

suspicion. Second, obvious attempts at evading officers support a reasonable suspicion. *Brignoni-Ponce*, 422 U.S. at 885. As stated above, Defendant reached high speeds the moment a large tractor-trailer blocked Agent Peterson from following. This behavior can reasonably be interpreted as an attempt at evasion. Third, Agent could see Defendant weaving in and out of traffic (Dkt. No. 40 at 21). This type of behavior is erratic, which contributes to a finding of reasonable suspicion. *See United States v. Medina*, 295 Fed.Appx. 702, 707 (5th Cir. 2008) (stating defendant's speeding assisted in concluding the "driver's behavior" factor).

The Court concludes the Defendant's driving behavior contributed to Agent Peterson's reasonable suspicion. Therefore, this factor weighs in favor of reasonable suspicion.

D. Usual Traffic Patterns

Courts typically find the "usual traffic patterns" factor weighs in favor of reasonable suspicion when the vehicle is traveling at a suspicious time of day. *See Jacquinot*, 258 F.3d at 429 (stating traveling early on a Sunday morning contributes to a finding of reasonable suspicion). This factor is often only implicated when the agent makes statements pointing to the time of day as a reason for his suspicion. *See United States v. Morales,* 191 F.3d 602, 605 (5th Cir. 1999) (stating the agent's knowledge about usual smuggler travel times contributed to a finding of reasonable suspicion).

Agent Peterson made no comments stating the time of day contributed to a raising of suspicion. Agent Peterson only testified to the time of the stop, 5:40 p.m.

(Dkt. No. 40 at 49). Further, the agent made no comments about when smugglers typically travel, and how such knowledge influenced his conclusion. Therefore, the Court concludes this factor weighs against reasonable suspicion.

E. Aspects of the Vehicle

An unfamiliar vehicle to the area can act as additional weight to establishing reasonable suspicion. *United States v. Inocencio*, 40 F.3d 716, 723 (5th Cir. 1994). Further, individual characteristics of a vehicle, including its cleanliness, can add to a reasonable suspicion. *United States v. Moreno-Chaparro*, 180 F.3d 629, 633 (5th Cir. 1998). Finally, a vehicle registered to a distant area has be found to raise reasonable suspicion where the driver is driving on an indirect road. *Zapata-Ibarra*, 212 F.3d at 884.

Defendant's vehicle was quite clean (Dkt. No. 40 at 17). Agent Peterson took special notice of this because vehicles driven in the area were typically dirty (*id*). A vehicle's degree of cleanliness can add to a reasonable suspicion. *Moreno-Chaparro*, 180 F.3d at 633. While a clean vehicle may not establish this factor itself, "observation of an unfamiliar and atypical-looking oil field vehicle with no company logos" has been found to assist in a reasonable suspicion determination. *Inocencio*, 40 F.3d at 723. Here, Agent Peterson took special notice of Defendant's vehicle because the type was seldom seen. (Dkt. No. 40 at 12). Agent Peterson further took notice of the lack of company logo (*id.*). By taking notice of the vehicle's unusualness, Agent Peterson added an additional basis to his reasoning.

Finally, Agent Peterson noted the vehicle was registered in Oklahoma (Dkt. No. 40 at 19). The Fifth Circuit has previously held registration in another state or city can add to reasonable suspicion. *Jacquinot*, 258 F.3d at 426. In *United States v. Zapata-Ibarra*, the vehicle was registered in San Angelo, Texas. *Zapata-Ibarra*, 212 F.3d at 883. Instead of traveling on a direct road to San Angelo, defendant traveled on an indirect route. *Id.* at 884. The agent concluded the defendant attempted to use the road as a means of circumventing the checkpoint, and the court found this fairly raised reasonable suspicion. *Id*. Here, the west access road had a much lower speed limit. It would be reasonable for Agent Peterson to believe a vehicle registered in Oklahoma would be traveling using the fastest route. The west access route is objectively slower than using I-35. Therefore, it was reasonable for Agent Peterson to conclude a vehicle registered in Oklahoma using the west access road may have been doing so for suspicious reasons.

Agent Peterson's observations in this case do establish a reasonable suspicion. Therefore, this factor weighs in favor of reasonable suspicion.

F. Recent Illegal Activity

Agent Peterson made no comment regarding recent illegal activity. Therefore, this factor weighs neutrally. *See United States v. Freeman*, 914 F.3d 337, 343 (finding lack of recent information fails to establish this factor).

G. Arresting Agent's Previous Experience

This factor considers the agent's previous experience and success rate. The arresting agent "is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling." *Brignoni-Ponce*, 422 U.S. at 885; *see United States v.*

Neufeld-Neufeld, 338 F.3d 374, 380 (5th Cir. 2003) (stating the court should look at the totality of the factors in the context of the agent's experience). The amount of time an agent serves is relevant but not dispositive to the question of experience. *Freeman*, 914 F.3d at 346.

In *United States v. Freeman*, the arresting agent had over eight years of experience at a border checkpoint. *Id*. The agent conducted many stops throughout his tenure. *Id*. But the stops prevented criminal behavior only ten percent of the time. *Id*. The Court concluded the agent's low success rate reflected a lack of experience and the stops added little weight to reasonable suspicion. *Id*.

Here, Agent Peterson stated he had served Border Patrol for approximately three years (Dkt. No. 40 at 10). During this time, Agent Peterson had stopped thirty vehicles (*id.* at 56). In those thirty stops, three to four resulted in arrest (*id*.). This gives Agent Peterson an approximately ten percent success rate (*id*.). Because Agent Peterson's success rate is low, his experience in detecting illegal activity is limited. *Freeman*, 914 F.3d at 346 (concluding the agent's low success rate inhibits a finding of reasonable suspicion). The Court appreciates Agent Peterson's dedicated service as a border patrol agent. Nonetheless, the Court finds Agent Peterson's experience in detecting illegal activity weighs against a finding of reasonable suspicion.

H. The Appearance of Passengers

The "appearance of the passengers" factor weighs neutrally. Agent Peterson made no observations regarding this factor. Therefore, Agent Peterson could not use this factor to help assist his reasoning for suspicion.

I. Weight of the Factors

"None of the factors alone is dispositive, and courts must analyze them as a whole, rather than each in isolation." *United States v. Rico-Soto*, 690 F.3d 376, 380 (5th Cir. 2012). The Government has successfully established four of the eight factors. The following factors weigh in favor of the Government: Proximity to the border, characteristics of the area, characteristics of the vehicle, and driver behavior. This Court concludes when the *Brignoni-Ponce* factors are viewed in their totality, reasonable suspicion existed to conduct the permissible roving patrol stop.

IV. CONCLUSION

For the foregoing reasons, the motion to suppress is **DENIED**.

It is so **ORDERED**.

SIGNED February ____, 2023

_____
XXXXXXXXXX
United States District Judge

Applicant Details

First Name	**Parker**
Last Name	**Ferguson**
Citizenship Status	**U. S. Citizen**
Email Address	**pferguson@jd24.law.harvard.edu**
Address	**Address** **Street** **700 Huron Ave** **City** **Cambridge** **State/Territory** **Massachusetts** **Zip** **02138** **Country** **United States**
Contact Phone Number	**3146145702**

Applicant Education

BA/BS From	**Middlebury College**
Date of BA/BS	**May 2019**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**International Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Ames Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Brady, Maureen
mnicola@law.harvard.edu
(617) 384-0099
Klarman, Michael
mklarman@law.harvard.edu
617-495-7646
Feldman, Noah
nfeldman@law.harvard.edu
617-495-9140

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Parker Ferguson
700 Huron Ave., Apt. 19M, Cambridge, MA 02138 | pferguson@jd24.law.harvard.edu | 314-614-5702

June 13, 2023

The Honorable David Steven Morales
United States District Court for the Southern District of Texas
United States Courthouse
1133 North Shoreline Boulevard, Room 320
Corpus Christi, Texas 78401

Dear Judge Morales:

I am a rising third-year student at Harvard Law School writing to apply for your next available clerkship position after I graduate in 2024. Although originally from Missouri, I have spent significant time in Texas. Most recently, I spent time working in Austin through the Capital Punishment Clinic, and I will return to Houston this summer. After living in the Northeast for nearly eight years, my time in Texas reminded me of home and I am excited about the prospect of putting down roots in the area.

Enclosed are my resume, transcripts, and writing sample. The following professors will submit letters of recommendation under separate cover and welcome inquiries in the meantime:

Noah Feldman	Michael Klarman	Maureen Brady
nfeldman@law.harvard.edu	mklarman@law.harvard.edu	mbrady@law.harvard.edu
617-495-9140	617-496-2050	617-384-0099

I have sharpened my skills in legal research, analysis, and writing in several academic and professional settings which are outlined on my resume. Across these experiences, I have developed a special pride in my situational awareness and attention to detail. Living with a severe visual impairment for most of my life has given me a unique appreciation for the value of increased awareness, and I work hard to guarantee that my work reflects a great deal of care and awareness so that it can serve both my clients and the broader community at the highest level. In addition to my strong work ethic and attention to detail, I have an excellent aptitude for collaborative and team-oriented work. Through my work in athletic and academic competition, I understand that the whole is always greater than the sum of its parts. I would relish the opportunity to apply my collaborative skills in your chambers.

Should you require additional information, please do not hesitate to let me know. Thank you for your consideration.

Sincerely,

Parker Ferguson

Parker Ferguson
Enclosures

PARKER FERGUSON

700 Huron Ave., Apt. 19M, Cambridge, MA 02138 | pferguson@jd24.law.harvard.edu | 314-614-5702

EDUCATION

HARVARD LAW SCHOOL, Cambridge, MA
Candidate for Juris Doctor, May 2024
Honors: Dean's Scholar Prize in Power: Ethics, Means, Ends
Activities: Harvard Prison Legal Assistance Project, Student Attorney
Capital Punishment Clinic, Sween Law
Teaching Fellow: Property (Fall 2022), Criminal Law (Spring 2023)
Harvard International Law Journal, Submissions Editor

MIDDLEBURY COLLEGE, Middlebury, VT
Bachelor of Arts, *summa cum laude,* in Political Science, May 2019
Thesis: *Liberty and Tradition: An Exploration of Substantive Due Process and Fundamental Rights*
Honors: Academic All-Conference, NFF Hampshire Honor Society (College Football Academic Honors)
College Scholar
Study Abroad: Universidad Carlos III de Madrid, Madrid, Spain, Spring 2018 (full language immersion)
Activities: Varsity Football, Pride Group Leader
Junior Varsity and Intramural Hockey, Team Captain

EXPERIENCE

SUSMAN GODFREY LLP, Houston, TX
Summer Associate, July 2023 – August 2023

CRAVATH, SWAINE & MOORE LLP, New York, NY
Summer Associate, May 2023 – July 2023

HARVARD LAW SCHOOL, Cambridge, MA
Research Assistant to Professor Michael Klarman, June 2022 – Present
Summarized constitutional jurisprudence and scholarship for students in Constitutional Law course. Researching history of race and sports for forthcoming project.

Research Assistant to Professor Christopher Lewis, September 2022 – November 2022
Provided line edits and substantive research for forthcoming philosophy article on racial justice.

TENNESSEE OFFICE OF THE POST-CONVICTION DEFENDER, Nashville, TN
Legal Intern, May 2022 – August 2022
Wrote memoranda and briefs on prosecutorial misconduct, ineffective assistance of counsel, and other constitutional claims for indigent death-row inmates in state collateral proceedings.

SULLIVAN & CROMWELL LLP, New York, NY
Litigation Paralegal, July 2019 – June 2021
Prepared key documents for court filings, client interviews, depositions, and government presentations in complex civil, securities and white-collar matters. Conducted factual investigation, research, and preliminary document review in preparation for bail hearings, proffer sessions, and sentencing proceedings in federal criminal court.

VOLUNTEER

SOUTH BRONX UNITED SOCCER, Bronx, NY, *Head Coach – Boys U8*, September 2019 – May 2021

READ AHEAD, *Literacy Promotion Mentor*, September 2015 – May 2021

PERSONAL

Spanish (fluent). Interested in literacy promotion, alpine skiing, NHL hockey, and personal fitness/wellness.

Harvard Law School

Date of Issue: June 6, 2023
Not valid unless signed and sealed
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Record of: Parker Ferguson
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 3 Greiner, D. James	P	4
1001	Contracts 3 Lessig, Lawrence	P	4
1006	First Year Legal Research and Writing 3B Barrow, Jennifer	P	2
1003	Legislation and Regulation 3 Stephenson, Matthew	P	4
1004	Property 3 Brady, Maureen	H	4
	Fall 2021 Total Credits:		18

Winter 2022 Term: January 04 - January 21

1051	Negotiation Workshop Franklin, Morgan	CR	3
	Winter 2022 Total Credits:		3

Spring 2022 Term: February 01 - May 13

1024	Constitutional Law 3 Bowie, Nikolas	H	4
1002	Criminal Law 3 Lewis, Christopher	H	4
1006	First Year Legal Research and Writing 3B Barrow, Jennifer	P	2
3106	Power: Ethics, Means, Ends Feldman, Noah * Dean's Scholar Prize	H*	4
1005	Torts 3 Ziegler, Mary	H	4
	Spring 2022 Total Credits:		18
	Total 2021-2022 Credits:		39

Fall 2022 Term: September 01 - December 31

3176	A Democracy Initiative Lessig, Lawrence	H	2
2020	Capital Punishment in America Steiker, Carol	P	4
2048	Corporations A Spamann, Holger	H	4
2050	Criminal Procedure: Investigations Crespo, Andrew	H	4
	Fall 2022 Total Credits:		14

Winter-Spring 2023 Term: January 01 - May 31

8005	Capital Punishment Clinic Steiker, Carol	CR	5
	Winter-Spring 2023 Total Credits:		5

Spring 2023 Term: February 01 - May 31

2366	Complex Litigation: Legal Doctrines, Real World Practice Clary, Richard	P	2
2453	Constitutional History II: From Reconstruction to the Civil Rights Movement Klarman, Michael	P	3
2079	Evidence Rubin, Peter	P	2
2140	Jurisprudence Brewer, Scott	H	3
	Spring 2023 Total Credits:		10
	Total 2022-2023 Credits:		29

Fall 2023 Term: August 30 - December 15

3216	Advanced Constitutional Law Feldman, Noah	~	4
2035	Constitutional Law: First Amendment Feldman, Noah	~	4
2445	Deals Subramanian, Guhan	~	2
2169	Legal Profession Gordon-Reed, Annette	~	3
2249	Trial Advocacy Workshop Sullivan, Ronald	~	3
	Fall 2023 Total Credits:		16

Spring 2024 Term: January 22 - May 10

2086	Federal Courts and the Federal System Fallon, Richard	~	5
	Spring 2024 Total Credits:		5
	Total 2023-2024 Credits:		21

continued on next page

Assistant Dean and Registrar

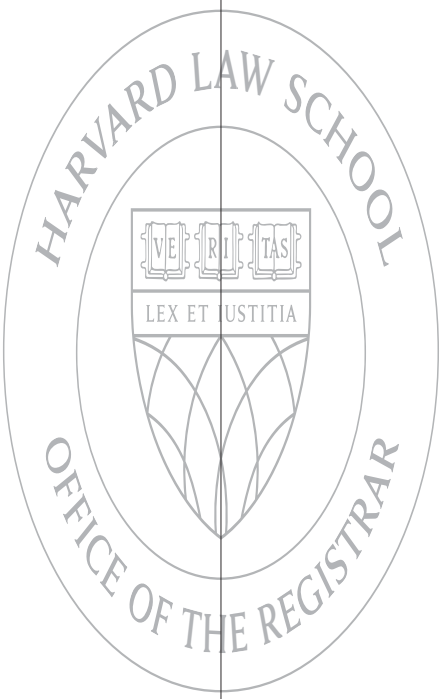
Harvard Law School

Record of: Parker Ferguson

Date of Issue: June 6, 2023
Not valid unless signed and sealed
Page 2 / 2

Total JD Program Credits: 89

End of official record



Assistant Dean and Registrar

HARVARD LAW SCHOOL
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Cambridge, Massachusetts 02138
(617) 495-4612
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registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

~~~~~~

A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

PARKER FERGUSON
700 Huron Ave., Apt. 19M, Cambridge, MA 02138 | pferguson@jd24.law.harvard.edu | 314-614-5702

WRITING SAMPLE

Drafted Summer 2022

Used with permission of the Tennessee Office of the Post-Conviction Defender.
Names and Client information have been removed to protect confidentiality.

MEMORANDUM

TO: Client Team

FROM: Parker Ferguson

DATE: 07/07/2022

RE: *McCoy* Claim

QUESTION PRESENTED

In *McCoy v. Louisiana*, the Court held that a defendant's Sixth Amendment right to the assistance of counsel is violated when counsel makes a concession of guilt at trial over their client's objection. 138 S. Ct. 1500, 1505 (2018). In the penalty phase of his capital trial, Mr. Client's trial counsel conceded the existence of an aggravating factor. Under *McCoy*, can Mr. Client prevail on a Sixth Amendment claim based on this concession?

BRIEF ANSWER

Possibly, but not likely. Mr. Client's outcome will depend on a court's reading of *McCoy* and whether counsel informed him of the decision to concede. Mr. Client's trial counsel conceded an aggravating factor, which functions as an element of the offense for purposes of sentencing. Assuming he was informed of the decision to concede, Mr. Client did not clearly object to this concession. Although he is arguably incapable of objecting due to his intellectual deficiencies, he was competent to stand trial, and thus was competent to waive his Sixth Amendment rights. Therefore, a court is not likely to conclude that his Sixth Amendment right to autonomy was violated if he was informed of the decision to concede. However, if trial counsel did not inform Mr. Client

of the decision to concede an aggravating factor, Mr. Client *may* succeed, depending on a court's analysis of the nature of the decision.

DISCUSSION

Whether *McCoy* applies in the penalty phase of a capital trial is an issue of first impression in Tennessee and the Sixth Circuit. However, in *McCoy*, the Supreme Court indicated that the focus of the analysis is the nature of the decision, not the procedural posture of the trial. Given the similarity between the decision to concede guilt or an element of the offense and the decision to concede an aggravating factor, Tennessee courts will likely hear a *McCoy* claim for a concession made during the penalty phase. However, despite the availability of a *McCoy* claim, the standard Tennessee courts apply in their analysis may defeat Mr. Client's claim. Tennessee courts have interpreted *McCoy* to require: (1) counsel conceding the defendant's guilt; and (2) over the defendant's objection. *Broadnax v. State*, No. W201801503CCAR3PC, 2019 WL 1450399 (Tenn. Crim. App. Mar. 29, 2019).[1] This memo will address each requirement in turn. Although the first requirement may represent an incorrect reading of *McCoy*, even under the correct reading, Mr. Client's claim may not satisfy the requirements, as his counsel's concession could fairly be characterized as strategic, and thus outside *McCoy*'s reach. Second, as a matter of law, Mr. Client's intellectual deficiencies do not mean he was incapable of objecting to counsel's concession. Therefore, if Mr. Client satisfies the first part of the analysis,

[1] Tennessee courts permit the citation of unpublished opinions. TENN. R. CR. A. CT. 19.

the outcome will depend on whether counsel informed Mr. Client of the decision to concede.

I. *McCoy* Likely Applies to the Penalty Phase of a Capital Trial

Whether a *McCoy* claim exists for a concession made during the penalty phase of a capital trial is a question of first impression in Tennessee and the Sixth Circuit. In *McCoy*, although the Court noted the procedural posture of the case when the concession was made, it was not determinative. Rather, the Court focused its analysis on the type of decision that trial counsel made unilaterally. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1506-09 (2018). At least one other federal court has recognized this focus on the type of decision in its analysis. *See, e.g., United States v. Roof*, 10 F.4th 314 (4th. Cir. 2021). In *United States v. Roof*, the Fourth Circuit considered whether *McCoy* prevents the presentation of mental-health mitigation during the penalty phase of a capital trial over a client's objection. *Id.* at 352-53. To answer the question, the court did not consider when the concession was made. Rather, it considered the nature of the decision, concluding that the presentation of mitigation evidence is "a classic tactical decision left to counsel … even when the client disagrees." *Id.* (quoting *United States v. Chapman*, 593 F.3d 365, 369 (4th. Cir. 2010)). In short, the nature of the decision controlled, not the phase of the trial. Thus, although Tennessee courts have not yet addressed a *McCoy* claim in the penalty phase context, they are likely to allow a claim for a concession made during the penalty phase and will focus on the nature of the decision in their analysis. For the purposes of this memorandum, I will therefore treat the procedural posture as irrelevant.

II. Trial Counsel Conceded the Equivalent of an Element of the Offense, Which May Satisfy the First Element of the *McCoy* Analysis

The nature of a decision determines whether it belongs to counsel or to the defendant. *McCoy*, 138 S. Ct. at 1512. When a defendant chooses to exercise their Sixth Amendment right to counsel, they do not surrender total control of their defense, as the Sixth Amendment "speaks of the '*assistance*' of counsel, and an assistant, however expert, is still an assistant." *Id.* (quoting *Faretta v. California*, 422 U.S. 806, 834 (1975)) (emphasis added). However, this does not mean that counsel must obtain their client's approval for every decision. Once retained, counsel exercises control over strategic decisions, as trial management is the lawyer's province. *Id.* (citing *Gonzalez v. United States*, 553 U.S. 242, 248 (2008)). Thus, when a defendant retains counsel, two classes of decisions exist: "decisions about how best to *achieve* a client's objectives … [and] choices about what the client's objectives in fact *are*." *Id.* (citing *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (noting self-representation will often increase the likelihood of an unfavorable outcome but "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty"); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in judgment) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State.")). Counsel controls strategic decisions about how to achieve an objective, while the defendant retains the ability to choose the overarching objective. *Id.*

Among the few fundamental decisions reserved to the client are whether to plead guilty, waive the right to a jury trial, testify on one's own behalf, and forgo an appeal. *Id.* (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). The focus in *McCoy* was the client's control over whether to plead guilty. The Tennessee Court of Criminal Appeals distilled from this the proposition that *McCoy* requires the concession be of the client's guilt. *Broadnax*, 2019 WL 1450399 at *6. However, this reading departs from the reasoning of *McCoy* in two respects. First, as Justice Alito observed in his dissent, at issue in *McCoy* was not a concession of guilt, but rather a concession of one of the material elements of the offense (namely the actus reus). *McCoy*, 138 S. Ct. at 1512 (Alito, J., dissenting). Second, both the Court of Criminal Appeals' and Justice Alito's line of reasoning improperly focus on the object of the concession (the defendant's guilt) rather than the nature of the decision (strategic or dealing with the objective of the defense).

Mr. Client's strongest argument relies on Justice Alito's account of *McCoy*. For Justice Alito, the first requirement of the *McCoy* analysis is that counsel concede an element of the offense. *Id.* Under Tennessee law, capital trials are bifurcated. TENN. CODE ANN. § 39-13-204. Once a defendant's guilt is determined, the trial essentially begins anew to determine the penalty that will be imposed. *See State v. Teague*, 1993 WL 86929 (Tenn. Crim. App. Mar. 25, 1993), *rev'd*, 897 S.W.2d 248 (Tenn. 1995) (reversed on other grounds) (characterizing a new sentencing hearing as a "resentencing trial"). To impose a sentence of death, the jury is required to find (1) the prosecution proved the existence of one or more aggravating factors beyond a

reasonable doubt; (2) that the aggravating factors outweigh the mitigating circumstances presented by the defendant. TENN. CODE ANN. § 39-13-204. In this sense, an aggravating factor plays the same role in the penalty phase that an element of the offense plays in the guilt-innocence phase. In *McCoy*, counsel conceded the defendant had killed the victims. *McCoy*, 138 S. Ct. at 1501. But first-degree murder has both an actus reus and mens rea requirement; therefore, the concession was not of the defendant's guilt to a charge of first-degree murder, but rather a concession of the actus reus element of the crime. *McCoy*, 138 S. Ct. at 1512 (Alito, J., dissenting). As in *McCoy*, Mr. Client's trial counsel did not concede his guilt. Rather, he conceded an aggravating factor. In Tennessee, to impose a sentence of death the prosecution must prove not only the existence of one or more aggravating factors, but also that the aggravating factors outweigh the mitigating circumstances. Just as counsel in *McCoy* did not concede the mens rea requirement for a first-degree murder conviction, Mr. Client's trial counsel did not concede that the aggravating factors outweighed the mitigating circumstances. Mr. Client's claim thus closely parallels the claim in *McCoy* as understood by Justice Alito.

But this reasoning does not get Mr. Client all the way. That *McCoy* dealt with the concession of an element of the offense, which is analogous to an aggravating factor in the penalty phase of a capital trial, says nothing about whether that concession is properly characterized as strategic. Indeed, Justice Alito recognized that his focus on the object of the concession left this question unanswered. *See McCoy*, 138 S. Ct. at 1516 (Alito, J., dissenting). And this is the critical question; if

the decision was strategic in nature, it falls outside of *McCoy*'s reach, even if *McCoy* is understood as dealing with the concession of an element of the offense. *McCoy*, 138 S. Ct. at 1508.

Recognizing this, the State will likely argue that the decision to concede an element of the offense, or an aggravating factor, is properly characterized as strategic. The State will likely posit there is only one objective that a defendant could plausibly pursue at the penalty phase: avoiding a sentence of death. *See Florida v. Nixon*, 543 U.S. 175, 191 (2004) ("the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared."). With the objective framed as such, the State will argue the decision to concede an aggravating factor should be characterized as strategic, as it does not bear on or alter the objective of avoiding a death sentence, but rather deals with the best means of achieving that objective. *See McCoy* 138 S. Ct. at 1512 (citing *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017).

But extending the strategic-versus-objective distinction in this manner ignores the justification for the distinction in the first place. In *Gonzalez v. United States*, the Court considered whether counsel could consent to a magistrate judge presiding over jury selection without their client's consent. 553 U.S. 242 (2008). The Court concluded that such a decision did not require the client's consent, explaining that "[n]umerous choices affecting conduct of the trial … depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial. These matters can be difficult to

explain to a layperson; and to require in all instances that they be approved by the client could risk compromising the efficiencies and fairness that the trial process is designed to promote." *Id.* at 249. In other words, the intersection of a decision with legal and procedural rules renders it properly in the realm of strategic decisions controlled exclusively by counsel. Compared with voir dire and the procedural rules governing jury selection implicated in *Gonzalez*, the decision to concede an aggravating factor is relatively easy to explain. The only intersection it makes with a lawyer's expertise is its relation to the burden of proof during the penalty phase, something could surely be explained to, and understood by, a defendant. Although it may not bear on the ultimate objective during the penalty phase, the decision to concede an aggravating factor is thus distinguishable from those decisions traditionally given to the unilateral control of counsel.

Regardless of the back-and-forth regarding the nature of the decision to concede an aggravating factor, a court may deny Mr. Client relief on the grounds that he did not clearly object to his counsel's concession.

III. Mr. Client Did Not Object to Counsel's Concession

Even where counsel concedes the defendant's guilt during the guilt-innocence phase of a capital trial, a defendant must have intransigently objected to counsel's concession to bring a Sixth Amendment claim under *McCoy* for a violation of their right to autonomy in their defense. *See, e.g., McCoy*, 138 S. Ct. at 1509 (granting relief where defendant opposed concession of guilt at every opportunity); *Nixon*, 543 U.S. at 186 (denying relief where defendant did nothing affirmative or negative when

presented with concession strategy); *Broadnax*, 2019 WL 1450399 at *6 (denying relief where nothing in the record demonstrated that defendant made an objection to the defense strategy). In fact, some courts have interpreted *McCoy* to require an objection be made on the record to sustain a claim. *See, e.g., In re Smith*, 49 Cal. App. 5th 377 (Cal. Ct. App. 2020) ("the record must show . . . that the defendant's plain objective is to maintain his innocence and pursue an acquittal") (citing *People v. Eddy*, 33 Cal. App. 5th 472, 482-83 (Cal. Ct. App. 2019); *Epperson v.* Commonwealth, 645 S.W.3d 405, 408 (Ky. 2021) ("The requirement of an objection on the record is only logical. Should an attorney concede guilt to the charged crime, the trial court can only presume that such a concession is part of a legitimate and agreed upon strategy absent an objection from the defendant himself. It is absurd to suggest otherwise, as that would force the trial court to divine whether the defendant does in fact have an objection to a concession of guilt").

In *Nixon*, counsel planned to functionally concede Nixon's guilt during trial to improve their chances of avoiding a death sentence during the penalty phase. *Nixon*, 543 U.S. at 181. Counsel presented Nixon with this strategy at least three times, and each time Nixon responded neither affirmatively or negatively. *Id.* at 181, 192. Counsel then proceeded with the strategy, and Nixon was found guilty and sentenced to death. *Id.* at 184. Nixon appealed, arguing that a concession of guilt requires an affirmative, explicit acceptance. *Id.* at 185. The Court rejected this argument, holding that "[w]hen counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic

choice is not impeded by any blanket rule demanding the defendant's explicit consent." *Id.* at 192. On the other hand, the *McCoy* Court repeatedly emphasized the defendant's intransigent objections to counsel's strategy, distinguishing the case from *Nixon*, and granted relief. *McCoy*, 138 S. Ct. at 1509.

Mr. Client's situation closely parallels *Nixon*. As in *Nixon*, nothing indicates that Mr. Client objected to counsel's decision to concede an aggravating circumstance. That Mr. Client's intellectual deficiency makes it difficult for him to process verbal communication does not change the outcome. The competency standard for waiving a right, such as the right to plead guilty or be represented by counsel, is the same as the competency standard for standing trial: "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.'" *Godinez v. Moran*, 509 U.S. 389, 389 (1993) (citing *Dusky v. United States*, 362 U.S. 402 (1960)).

The competency standard for standing trial is easily satisfied. In *Stanley v. Lazaroff*, the Sixth Circuit reviewed an Ohio court's determination that defendant was competent to stand trial. 82 F. App'x 407 (6th Cir. 2003). Despite the defendant's prelingual deafness and lower level of intellectual functioning, including an inability to read or write, the court found the conclusion that defendant was competent to stand trial sufficiently supported by the record. *Id.* at 416. In reaching their conclusion, the court observed that expert testimony supported a finding that defendant "knew he was accused of killing a woman, understood that he could be punished, was able to relate past events, and was able to understand testimony." *Id.*

Moreover, the use of interpreters enabled the defendant to understand the proceedings, consult with his counsel, and assist in his defense. *Id.* at 417. In other words, a near complete lack of communicative skills did not render the defendant per se incompetent to stand trial.

Here, Mr. Client was deemed competent to stand trial, and thus a court is likely to find him competent to waive his Sixth Amendment right to autonomy in his defense. Although Mr. Client struggles to understand verbal communications, his deficiency likely does not rise to the level present in *Stanley*, and so does not per se render him incompetent to stand trial and/or waive his rights. Furthermore, like the interpreters in *Stanley*, there were means available to overcome Mr. Client's deficiency, such as communicating with Mr. Client in writing. Assuming counsel adequately informed Mr. Client of his plan to concede the aggravating factor, Mr. Client's failure to object likely dooms his claim under *McCoy* and *Nixon*.

If, however, counsel did not inform Mr. Client of his plan to concede the aggravating factor or failed to use an interpretive tool to overcome Mr. Client's intellectual deficiency, a court will be more likely to grant relief. As the Court explained in *Nixon*, an attorney undoubtedly has a duty to consult with their client regarding important decisions, including questions of overarching defense strategy. *Nixon*, 543 U.S. at 186 (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). Whether an attorney's failure to consult with their client triggers a *McCoy* analysis, or the typical *Strickland* ineffective assistance of counsel analysis, again turns on the nature of the decision.

As discussed above, if *McCoy* is read as holding a concession of the element of an offense to be structural error, then a court may grant Mr. Client relief on the grounds that his counsel's failure to consult him regarding the decision to concede what was essentially an element of the offense constitutes structural error. Mr. Client would have a strong argument that if counsel's failure to heed his objections would be sufficient for relief under *McCoy*, then surely a failure to give him an opportunity to object should also suffice. In both scenarios, the outcome is the same: his voice was ignored, and he was denied the ability to exercise his Sixth Amendment right to autonomy in his defense. On the other hand, if the decision to concede an aggravating factor is distinct from a concession of guilt, counsel's failure to consult Mr. Client would be analyzed under *Strickland*, which is outside the scope of this memorandum.

CONCLUSION

Whether Mr. Client succeeds on a *McCoy* claim for his trial counsel's concession of an aggravating factor during the penalty phase of his capital trial depends on how a court reads *McCoy*, and whether Mr. Client was informed of the decision to concede. Tennessee courts have interpreted *McCoy* to require that the concession be of defendant's guilt. Mr. Client's trial counsel did not concede his guilt. Although under another reading of *McCoy* the concession of an aggravating factor is analogous to the concession of an element of the offense, and distinguishable from decisions typically surrendered to the unilateral control of counsel, this argument may not save Mr. Client's claim. If trial counsel informed Mr. Client of the decision to concede, Mr. Client failed to object and a court is likely to deny relief, notwithstanding his

intellectual deficiencies. However, if trial counsel did not inform Mr. Client of the decision to concede, Mr. Client *may* obtain relief *if* a court reads *McCoy* as applying the concession of an element of the offense and accepts Mr. Client's argument that the concession of an aggravating factor is sufficiently analogous.

Applicant Details

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Contact Phone Number	**5402193580**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2017**
JD/LLB From	**Baylor University School of Law** **http://www.baylor.edu/law/**
Date of JD/LLB	**April 27, 2024**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Baylor Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Baylor Law Faegre-Drinker Spring Moot Court Competition, 2022** **Judge John R. Brown Admiralty Moot Court Competition, 2023** **National Veterans Law Moot Court Competition, 2022**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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May 29, 2023

The Honorable David S. Morales
U.S. District Court for the Southern District of Texas
United States Courthouse
1133 N. Shoreline Blvd.
Corpus Christi, Texas 78401

Dear Judge Morales:

I am writing to apply for a clerkship position in your chambers beginning in August 2024. I am a rising third-year student at Baylor Law School, serving as the Managing Senior Executive Editor for the *Baylor Law Review*. I plan to practice litigation in Houston and hope to eventually serve as an assistant U.S. attorney.

I believe I can contribute to your chambers with my strong research and writing skills. My first-year legal writing received recognition, including the High A in my appellate legal writing class. This year, I have continued to develop my writing by competing in two moot court competitions and serving as a research assistant. My internship with the Travis County District Attorney's Office required extensive legal research and writing for criminal appellate cases. This builds upon my professional editorial, grant writing, and research experience.

Enclosed are my resume, law school and undergraduate transcripts, and writing sample. The writing sample is an appellate brief examining the proper legal framework for IVF pre-embryo ownership. Additionally, I have enclosed letters of recommendation on my behalf from the following individuals:

Professor Chris Jaeger	Holly Taylor
Baylor Law School	Travis County District Attorney's Office
Waco, Texas	Austin, Texas
Chris_Jaeger@baylor.edu	Holly.Taylor@traviscountytx.gov
(254) 710-6590	(512) 496-8253

Please let me know if I can provide any other information that would be helpful. Thank you for your time and consideration.

Sincerely,

Olivia Schoffstall

OLIVIA J. SCHOFFSTALL

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EDUCATION

Baylor University School of Law, Waco, TX 2024
Candidate for Juris Doctor, GPA: 3.63, Class Rank: 22/198 (Top 11%)

Honors: High A: Federal Courts; Criminal Procedure; Persuasive Communication; Supreme Court Seminar
Dean's List (six quarters)
Baylor Barrister Society

Advocacy: Judge John R. Brown Admiralty Moot Court Competition, March 2023 (Semi-finalist; Best Team Oral Advocates, 1st Place; Best Brief, 3rd Place; Best Oral Advocate, 4th Place)
National Veterans Law Moot Court Competition, November 2022

Activities: *Baylor Law Review* (Managing Senior Executive Editor, 2023–24)
Christian Legal Society (Vice President, 2022–23)
Federalist Society
Blackstone Legal Fellowship

Reformed Theological Seminary, Washington, D.C. 2018
Non-degree fellowship involving theological writing courses focused on vocation and service.

University of Virginia, Charlottesville, VA 2017
Bachelor of Arts in Economics & Minor in Religious Studies, GPA: 3.30

Honors: Dean's List

Study Abroad: University of Edinburgh, Edinburgh, Scotland, Fall 2015

EXPERIENCE

Hogan Lovells US LLP, Houston, TX May–July 2023
Summer Associate, Litigation, Arbitration, and Employment Group (full-time)

Baylor University School of Law, Waco, TX January–May 2023
Research Assistant to Professor Jessica Asbridge (part-time)
Conducted legal research for a 50-state survey of the application of state Excessive Fines Clauses.

Travis County District Attorney's Office, Austin, TX May–August 2022
Legal Intern, Conviction Integrity Unit (full-time)
Conducted legal research and drafted memoranda assessing claims for actual innocence and wrongful conviction.

Limestone County District Attorney's Office, Groesbeck, TX April–May 2022
Legal Intern (part-time)
Drafted charges, stipulations, memoranda, and responses to writs of habeas corpus. Conducted legal research.

Prison Fellowship, Washington, D.C.
Legal Research Contractor (part-time) April–August 2022
Supported legislative research projects, including drafting criminal justice campaign and lobbying materials.

Advocacy External Relations & Project Manager (full-time) June 2018–July 2021
Provided project management for criminal justice reform campaigns in 14 jurisdictions. Oversaw federal and state lobby compliance for 250+ staff. Served as primary contact for coalition partners, funders, and media.

Center for Public Justice, Washington, D.C. September 2017–May 2018
Assistant Editor, Shared Justice (part-time)
Managed *Shared Justice* writers and communications. Provided editorial review for all published articles.

Other Experience: The Juice Laundry (*Smoothie Maker*); Ashoka (*Intern*, data analysis); Community Investment Collaborative (*Intern*, micro-loan advisement); Trinity Education (*Intern*, computer programming).

ADDITIONAL INFORMATION

Violinist, long-distance runner and road cyclist, Executive Producer of *A New Day 1* (documentary following people returning home after incarceration), conversational in Italian and Spanish, semi-professisonal house sitter.

OLIVIA J. SCHOFFSTALL

Baylor Law School

UNOFFICIAL LAW SCHOOL TRANSCRIPT

Fall 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Torts 1	Jim Underwood	A-	4	
Contracts 1	Larry Bates	B+	4	
Civil Procedure	Jeremy Counseller	B-	4	
LARC: Intro to Legal Writing	Matthew Cordon	A-	2	Part 1 of 2

Winter 2021-22

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts 2	Larry Bates	A	4	
Criminal Law	Paul Yanowitch	A-	3	
Property 1	Jessica Asbridge	B+	4	
Torts 2	Jim Underwood	B+	3	
LARC: Intro to Legal Writing	Matthew Cordon	A-	1	Part 2 of 2

Spring 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Procedure	Paul Yanowitch	A	3	High A
Property 2	Jessica Asbridge	A	3	
Con Law: Individual Liberties	Brian Serr	A-	3	
LARC: Persuasive Comm.	Chris Jaeger	A	2	High A

Fall 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Trusts & Estates	Tom Featherston	B+	5	
Business Organizations 1	Elizabeth Miller	B+	5	
Tax & Accounting Principles	Christine Robinson	B+	2	
Supreme Court Seminar	Brian Serr	A	2	High A
Moot Court	Larry Bates	A	2	

Winter 2022-23

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Federal Courts	Paul Yanowitch	A	3	High A
Con Law: Structure & Powers	Brian Serr	A	4	
Alternative Dispute Resolution	Chris Jaeger	A	2	
Federal Administrative Law	Jessica Asbridge	A-	2	
LARC: Transactional Drafting	Kayla Landeros	A-	1	

Spring 2023

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Legal Research	Matthew Cordon	A	3	
Complex Litigation	Jim Underwood	A-	3	
Conflict of Laws	Luke Meier	A-	3	
Remedies	Laura Hernandez	B+	3	
LARC: Litigation Drafting	Greg White	A-	1	
Moot Court	Lee Ann James	A	2	

OLIVIA J. SCHOFFSTALL

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WRITING SAMPLE

The following writing sample is a brief to the Supreme Court of Texas from my persuasive legal writing class. The brief argues for the nonenforcement of an IVF informed consent form based on Texas legislative policy, precedent, and the parties' lack of mutual assent. I received the High A for this brief. The content has not been substantively edited since submission.

No. 21-BLS001

In the Supreme Court of Texas

AXEL B.,

Petitioner,

v.

REANNA B.,

Respondent.

On Petition for Review from the
Court of Appeals for the Fifteenth District of Texas

RESPONDENT'S BRIEF ON THE MERITS

Olivia Schoffstall
Professor Jaeger
Attorney for Respondent
April 14, 2022

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ISSUES PRESENTED

I. Whether the balancing-of-interests approach is the proper legal framework for determining the disposition of frozen pre-embryos when one party has a change of heart after entering an agreement that requires them to procreate.

II. Whether the balancing-of-interests approach is the proper legal framework to apply when the parties lack an enforceable agreement governing the disposition of their remaining frozen pre-embryos in the event of divorce.

STATEMENT OF JURISDICTION

This appeal was taken from a final judgment of the Court of Appeals for the Fifteenth District of Texas. This Court has appellate jurisdiction pursuant to Tex. Gov't Code § 22.001. Tex. Gov't Code § 22.001.

STATEMENT OF FACTS

I. Factual Background

Reanna B. (respondent) and Axel B. (petitioner) were married in 2011. J.A. at 5. Reanna struggled to become pregnant. J.A. at 5. Looking for alternatives, she underwent an examination by Dr. Maxine Fusewood at the Assisted Reproduction Services Center of Ricken County (the Center). J.A. at 5. Dr. Fusewood advised the couple that In Vitro Fertilization (IVF) could significantly increase Reanna's chances of becoming pregnant due to her scarred fallopian tubes and ovarian insufficiency.[1] The parties decided to try for a biological child through IVF and scheduled the procedure for November 2016. J.A. at 7.

During a brief, 20-minute office visit before the first IVF procedure, the Center required Reanna and Axel to sign nine different forms. J.A. at 7. Among the forms was the "Informed Consent for Cryopreservation of Pre-Embryos," a four-page single-spaced document describing the cryopreservation process and the procedure's risks.[2] The form also provided instructions for cryopreserved pre-embryos in the event of certain contingencies. J.A. at 38. It offered six options for the disposition of frozen pre-embryos after divorce. J.A. at 38.

Before this visit, Axel independently considered the pre-embryos' disposition in the event of divorce. J.A. at 8. He decided he would be comfortable donating the

[1] IVF consists of a series of procedures to collect and fertilize a woman's eggs, resulting in pre-embryos. "Pre-embryo" is the medical term for a fertilized egg that has not been implanted in a uterus. The pre-embryo develops fully only if it is implanted, after which a viable pregnancy may occur. J.A. at 4, 6.

[2] Pre-embryos are either implanted in a uterus or cryopreserved for possible future use. J.A. at 6.

pre-embryos to another IVF couple. J.A. at 8. When signing the form, Axel suggested they select the option to donate the pre-embryos anonymously if they divorced. J.A. at 8. Reanna signed the form without giving that question much thought. J.A. at 8. She only agreed with Axel's decision because she wanted to move forward with the IVF process. J.A. at 9. Divorce was the last thing on her mind. J.A. at 8.

After the Center obtained Reanna and Axel's consent, the couple began the IVF process and produced ten pre-embryos. J.A. at 8. Reanna underwent two unsuccessful rounds of implantation using four of the ten pre-embryos. J.A. at 8. At that point, Axel decided that he did not want to do the procedure again. J.A. at 8. Reanna disagreed, and the couple's relationship deteriorated. J.A. at 8. They separated in July 2019 and filed for divorce soon after. J.A. at 8. In the divorce proceeding, Reanna and Axel disputed the proper disposition of the remaining six pre-embryos generated through the parties' participation in IVF. J.A. at 4.

II. Procedural History

The parties filed competing motions for summary judgment and stipulated the treatment of the pre-embryos as "property with special dignity."[3] Reanna argued that the informed consent form should not govern this dispute and that the court should apply the balancing-of-interests test instead. J.A. at 10. She desires to use the pre-embryos in additional IVF rounds and resents that another couple should have her pre-embryos. J.A. at 9. Meanwhile, Axel argued that the court should enforce the

[3] Treating pre-embryos as "property with special dignity" occupies an interim legal category applied by most courts to consider this issue. *See, e.g.*, *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (describing pre-embryos as occupying "an interim category that entitles them to special respect because of their potential for human life").

informed consent form. J.A. at 10–11. Alternatively, he argued that the Center should continue to store the pre-embryos until the parties agree on a disposition. J.A. at 11.

The trial court granted Reanna's motion for summary judgment and denied Axel's motion. J.A. at 11. The court then issued a final divorce decree awarding the pre-embryos to Reanna. J.A. at 11. Axel appealed, and the Court of Appeals affirmed. He then filed a petition for review to the Texas Supreme Court. J.A. at 11.

SUMMARY OF THE ARGUMENT

The law exists to protect humans. To achieve this purpose, the law must account for human nature. And for better or worse, a fundamental aspect of being human is changing one's mind. The ability to reconsider and improve is crucial to human identity and survival. Laws that ignore or penalize this reality in matters as intimate as procreation are ineffective and unethical.

This case is about recognizing the humanity of Texans seeking to build a family. This Court should affirm because Texas policy and precedent support the application of the balancing-of-interests test when one party has a change of heart after entering an agreement that would force them to procreate. In the alternative, the balancing-of-interests test is the appropriate legal framework to apply when the parties lack an enforceable agreement governing the disposition of their remaining pre-embryos in the event of divorce.

The balancing-of-interests test embodies principles codified in Texas law in two ways. First, Texas legislative policy gives effect to a party's change of heart in other procreation agreements. Second, Texas legislative policy indicates a role for courts in

similar contexts, warranting the application of the balancing-of-interests test here. Notably, the *Roman* court's analysis of Texas policy should not extend to this case because it ignores pertinent provisions in the Texas Family Code (TFC) and provides an inadequate remedy for this case.

Further, applying the balancing-of-interests test is consistent with precedent. Enforcing Reanna and Axel's agreement would be inconsistent with precedent in this state and other jurisdictions by forcing Reanna to become a genetic parent. Additionally, most courts have rejected the mutual contemporaneous consent approach because it fails to resolve disputes effectively.

In the alternative, courts have applied the balancing-of-interests test absent an enforceable agreement. Courts have refused to enforce informed consent forms as binding divorce agreements when they lacked mutual assent. Because the parties' informed consent form lacks mutual assent, this Court should apply the balancing-of-interests test.

STANDARD OF REVIEW

The standard of review for summary judgment is de novo. *Mid-Century Ins. Co. of Texas v. Ademaj*, 243 S.W.3d 618, 621 (Tex. 2007). When the parties both moved for summary judgment at trial and the court granted one while denying the other, the court of review will "determine all questions presented and render the judgment the trial court should have rendered." *Id.*

ARGUMENT

I. This Court should affirm because Texas policy and precedent support the application of the balancing-of-interests test when one party has a change of heart after entering an agreement that would force them to procreate.

Courts have considered three pathways to resolve the disposition of frozen pre-embryos upon the divorce of the progenitors. *Bilbao v. Goodwin*, 217 A.3d 977, 984–96 (Conn. 2019) (reviewing the approaches). First, under the balancing-of-interests test, the court weighs each party's interests and desires for the pre-embryos. *Id.* at 985. Second, courts applying the contractual approach presume agreements between the progenitors governing the disposition of the pre-embryos are valid and enforceable in disputes between the couple. *Id.* at 984. Lastly, the mutual contemporaneous consent approach requires the parties to agree to a disposition of the pre-embryos; otherwise, the pre-embryos remain in storage indefinitely. *Id.* at 985.

Most courts have chosen to apply the balancing-of-interests test or the contractual approach. *See, e.g.*, *Bilbao*, 217 A.3d at 986 (applying the contractual approach); *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001) (applying the balancing-of-interests test). In doing so, courts have explicitly rejected the mutual contemporaneous consent approach for two reasons. *See, e.g.*, *In re Marriage of Rooks*, 429 P.3d 579, 592 (Colo. 2018), *cert. denied*, 139. S. Ct. 1447 (2019) (rejecting the mutual contemporaneous consent approach). First, this approach is unrealistic because the parties would not be in court if they could reach a mutual decision for the disposition of their pre-embryos. *Id.* at 589. Second, the party opposing the other

party's intended use is guaranteed a de facto win simply by the passage of time. *Id.* Through this, a party may independently achieve a result the court was unwilling to grant when it decided the case. *Id.* For these reasons, this Court should narrow its inquiry for the proper legal framework to the balancing-of-interests test and the contractual approach.

A. Texas legislative policy supports the application of the balancing-of-interests test when a party has a change of heart after entering an agreement that would result in procreation.

This Court has long held that parties may not contract in a manner that contravenes public policy. *Curlee v. Walker*, 244 S.W. 497, 498 (Tex. 1922). Texas positive law is the first place to turn when asking what constitutes Texas public policy. The Texas legislature has addressed the enforcement of agreements for assisted reproduction and surrogacy in the Uniform Parentage Act. Tex. Fam. Code Ann. §§ 160.701–.707, .751–.763. The Act recognizes changes in heart and the role of the court in procreational agreements. These principles can inform whether the enforcement of Reanna and Axel's agreement would violate Texas policy.

1. Texas legislative policy gives effect to a party's change of heart in agreements for procreation.

Human nature does not evaporate once a contract is signed. Parties acting in good faith may enter an agreement and then later have a change of heart. The likelihood of a person changing their mind increases when the subject matter is an intimate topic, and even more so over time. *See In re Marriage of Witten*, 672 N.W.2d 768, 777 (Iowa 2003) (explaining the difficulty of deciding to relinquish a right before exercising that right). The Texas Family Code (TFC) recognizes and gives effect to

this reality in agreements to procreate through surrogacy and assisted reproduction. Tex. Fam. Code Ann. §§ 160.706, .754(e), .759(a).

TFC gives effect to changes of heart in surrogacy agreements in two provisions. First, TFC permits parties to terminate a surrogacy agreement before insemination. Tex. Fam. Code Ann. § 160.759(a). Any party to the agreement may terminate it, including the gestational mother, spouse, or intended parent. *Id.* Second, TFC provides that parties to a surrogacy agreement must enter the agreement at least 14 days before insemination. Tex. Fam. Code Ann. § 160.754(e). By providing a two-week window for the parties to reflect upon the agreement, the legislature recognized that people are apt to change their minds in consequential matters like procreation. For this reason, the law permits a party to withdraw from the agreement without penalty. *Id.*

TFC also addresses changes of heart in the context of assisted reproduction, specifically the effect of a dissolved marriage on an assisted reproduction agreement. Tex. Fam. Code Ann. § 160.706. The statute expressly permits a former spouse to withdraw their consent to assisted reproduction before insemination. *Id.* Even after divorce, a spouse can change their mind about participating in assisted reproduction and thus avoid legal parenthood. *Id.*; J.A. at 18.

These statutes demonstrate that Texas law does not force a person to procreate against their will for the sake of contractual posterity. Instead, the law recognizes and gives effect to a party's change of heart in agreements to procreate. J.A. at 18–19. Courts outside of Texas have reached similar conclusions after examining their

states' laws on contracts that involve familial relationships (e.g., surrogacy, adoption, and marriage). *See, e.g.*, *J.B.*, 783 A.2d at 717–19 (holding assisted reproduction agreements are enforceable subject to the right of either party to change their mind about the disposition of pre-embryos); *Witten*, 672 N.W.2d at 781–83 (reasoning that giving effect to either party's change of heart acknowledges policy concerns inherent in enforcing prior decisions of a personal nature, like IVF).

Here, Reanna and Axel's agreement is like the agreements for surrogacy and assisted reproduction addressed by the legislature in two ways: (1) the makeup of the parties and (2) the purpose of the agreement. First, in agreements for surrogacy and assisted reproduction, the parties are a couple seeking to have a child and a third party. Tex. Fam. Code Ann. §§ 160.704, .754. In surrogacy agreements, the third party is the surrogate mother; in assisted reproduction, the third party is the health care provider. Tex. Fam. Code Ann. §§ 160.704, .754. Here, Reanna and Axel were a married couple seeking to have children when they signed the informed consent form. J.A. at 7. The third party to their agreement is the Center. J.A. at 5, 7. Therefore, the parties to Reanna and Axel's agreement are like the parties to the procreational agreements addressed by the legislature. Tex. Fam. Code Ann. §§ 160.704, .754. Second, surrogacy and assisted reproduction agreements share the same ultimate purpose as Reanna and Axel's informed consent form: for some parties to achieve procreation. J.A. at 7. For these reasons, the legislative intent behind these surrogacy and assisted reproduction provisions should apply to Reanna and Axel's agreement.

Further, Reanna has had a sincere change of heart. J.A. at 9. The informed consent form does not reflect her present desires, and Texas policy does not force her to be bound by that agreement. J.A. at 9, 19. Instead, the balancing-of-interests test is the appropriate framework to resolve her dispute. J.A. at 9. This approach would allow the Court to carefully weigh Reanna's present interests and desires, alongside Axel's present interests and desires, in deciding who should retain custody of the pre-embryos. *See J.B.*, 783 A.2d 716–17, 719–20 (applying the balancing-of-interests test). Recognizing that people often change their minds about significant life events, the balancing-of-interests approach gives this Court the power to "break [the] deadlock" between the disagreeing parties. J.A. at 19. For this reason, the mutual contemporaneous consent approach would be inappropriate. *See Rooks*, 429 P.3d at 589 (explaining the mutual contemporaneous consent approach fails to resolve disputes effectively). Although that approach would recognize Reanna's change of heart, it would prolong rather than resolve the parties' dispute. *Id.*

2. Texas legislative policy affirms the role of the court in determining whether to enforce procreation agreements.

While freedom of contract is a valued Texas policy, the legislature has expressed that judicial intervention is warranted and necessary for certain types of contracts. Tex. Fam. Code Ann. §§ 160.755, .756. TFC permits parties to enter surrogacy agreements freely, but a court must validate the agreement. Tex. Fam. Code Ann. § 160.754(a). The court considers several factors, including whether each party has voluntarily entered and understands the agreement. Tex. Fam. Code Ann.

§ 160.756(b). A court may choose to validate an agreement at its discretion, and an agreement that the court does not validate is unenforceable. Tex. Fam. Code Ann. §§ 160.756(d), .762(a).

Texas policy does not reflect no-holds-barred freedom of contract for parties entering agreements for procreation. Tex. Fam. Code Ann. §§ 160.756(b), (d), .762(a). Instead, the law demonstrates a clear and prescribed role for the judiciary. Tex. Fam. Code Ann. §§ 160.756(b), (d), .762(a). Given the sensitive subject matter, the legislature has deemed it necessary for courts to have the final say on whether a surrogacy agreement is valid and enforceable. J.A. at 18.

Reanna and Axel's agreement warrants the same judicial treatment as surrogacy agreements because the parties' makeup and the agreements' purposes are similar. For this reason, this Court should play a role in determining the enforceability of assisted reproduction agreements when a party changes its mind. *See* J.A. at 18–19 (finding the legislature's intent extends to this case). In both scenarios, the State has an interest in protecting vulnerable parties contracting for highly intimate, consequential subject matter: children.

The balancing-of-interests test provides the necessary judicial discretion for Reanna and Axel's dispute. This approach is also analytically similar to the court's validation of surrogacy agreements. *See Rooks*, 429 P.3d at 593–94 (listing the factors for the balancing-of-interests test); Tex. Fam. Code Ann. § 160.756(b). Both analyses consider the parties' conduct in reaching a procreative decision. *Rooks*, 429 P.3d at 594; Tex. Fam. Code Ann. § 160.756(b). Under the balancing-of-interests test, the

court considers whether either party has acted in bad faith to control the pre-embryos. *Rooks*, 429 P.3d at 594. Similarly, the court assesses whether the parties voluntarily entered and understood the surrogacy agreement, which includes considering any bad faith conduct by one party in obtaining the assent of another. Tex. Fam. Code Ann. § 160.756(b)(4). Additionally, both analyses consider the parties' physical ability to bear children and intent for entering the agreement. Tex. Fam. Code Ann. §§ 160.756(b)(2), (4), (5); *Rooks*, 429 P.3d at 593–94. Because of these similarities, applying the balancing-of-interests test to the parties' dispute is an appropriate expression and extension of legislative intent.

Meanwhile, applying the mutual contemporaneous consent approach here would be inconsistent with the legislature's intent for courts to settle disputes involving procreation affirmatively. Tex. Fam. Code Ann. §§ 160.755, .756. The parties have turned to this Court for a swift resolution of their dispute; the Court should not send them home without a remedy. *Rooks*, 429 P.3d at 592.

3. The *Roman* court's analysis of Texas policy should not extend to this case.

While the *Roman* court addressed current Texas law regarding surrogacy and assisted reproduction, its analysis was incomplete and did not provide a workable remedy for this dispute. *See Roman v. Roman*, 193 S.W.3d 40 (Tex. App.—Houston [1st Dist.] 2006, pet. denied), *cert. denied*, 552 U.S. 1258 (2008).

After a cursory review of the TFC provisions on surrogacy and assisted reproduction, *Roman* gleaned that the policy of this state would permit a husband and wife to enter an advance agreement that provides the disposition of pre-embryos

in the event of contingencies. *Roman*, 193 S.W.3d at 49–50; J.A. at 18. From this observation, the court jumped to the sweeping conclusion that enforcing such agreements would not violate Texas policy. *Roman*, 193 S.W.3d at 50; J.A. at 18. But a policy that permits an agreement to exist does not necessarily permit the enforcement of that agreement when a party changes its mind. In reaching its decision, the *Roman* court ignored the legislature's clear recognition of a party's change of heart in other agreements to procreate. Tex. Fam. Code Ann. §§ 160.706, .754(e), .759(a); J.A. at 18–19.

Further, the *Roman* court reconciled the risks associated with changes of heart with an inadequate solution. When a court chooses not to recognize a change of heart, it denies a party's present procreative interests and desires. *See Roman*, 193 S.W.3d at 45 (identifying the risks associated with enforcing an agreement that no longer reflects a party's desires). *Roman* noted the prevalence of provisions that permit parties to modify the terms of an assisted reproduction agreement with their mutual, written consent. *Id.* The court concluded that such provisions sufficiently protect parties from the risks associated with changes of heart. *Id.* But this type of provision only protects a party's change of heart when the other party feels the same way. It does not protect a party that has independently changed its mind.

Here, the parties' agreement contained a provision that allowed them to modify their agreement with joint, written consent. J.A. at 38. This provision bears no relevance to Reanna and Axel's dispute. If the parties could reach a mutual decision to modify their agreement, they would not be in court. J.A. at 19. For these reasons,

Roman's conclusions regarding Texas policy should not inform this Court's decision. J.A. at 18.

B. Applying the balancing-of-interests test when a party has a change of heart after entering an agreement requiring procreation would be consistent with precedent in most jurisdictions, including Texas.

Case law addressing IVF agreements demonstrates a preference for enforcing agreements that do not result in the creation of life and discomfort with enforcing agreements that would force one party to procreate against its will.

1. Courts generally do not enforce contracts that would force a party to procreate against its will.

In virtually every case that has applied the contractual approach, the effect of the parties' agreement was to discard the remaining pre-embryos or donate them to research in the event of divorce. *See, e.g.*, *Roman*, 193 S.W.3d at 42 (contract provided the pre-embryos shall be discarded); *Kass v. Kass*, 696 N.E.2d 174, 181 (N.Y. 1998) (contract provided the pre-embryos shall be donated to the IVF clinic's research program); *Bilbao*, 217 A.3d at 980 (contract provided the pre-embryos shall be discarded); *Litowitz v. Litowitz*, 48 P.3d 261, 264 (Wash. 2002) (contract provided the pre-embryos shall be discarded after five years); *Dahl v. Angle*, 194 P.3d 834, 836–38 (Or. Ct. App. 2008) (contract provided the wife was the decision-maker and her preference was to discard pre-embryos). Under these contracts' terms, neither party would become a parent against its will because the pre-embryos would never be implanted. *See, e.g.*, *Bilbao*, 217 A.3d at 980 (pre-embryos discarded by clinic).

Meanwhile, in jurisdictions that have applied the balancing-of-interests test, the effect of enforcing the parties' agreement was that one party would become a genetic or biological parent against their wishes. *See, e.g.*, *J.B.*, 783 A.2d at 717 (refusing to enforce an agreement that would force the wife to be a genetic parent against her will by donating the pre-embryos to another couple, applying the balancing-of-interests test instead); *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058 (Mass. 2000) (refusing to enforce an agreement that gave the wife sole custody of the pre-embryos because it would force the husband to become a biological father against his will, applying balancing-of-interests test instead); *McQueen v. Gadberry*, 507 S.W.3d 127, 147 (Mo. Ct. App. 2016) (refusing to enforce an agreement that would force the husband to become a biological father against his will by providing the wife sole custody of the pre-embryos). In these cases, one party had a change of heart since entering the agreement. *E.g.*, *J.B.*, 783 A.2d at 710. These holdings demonstrate a judicial discomfort with enforcing agreements that require a party to procreate in a manner that no longer reflects their will. *See, e.g.*, *id.* at 719 (holding IVF agreements are unenforceable when a party changes its mind). This hesitation makes sense, given that state and federal courts are bound to protect a person's constitutional right to avoid procreation. *See, e.g.*, *id.* at 715–16 (acknowledging the implication of parties' constitutional rights in procreation disputes).

Applying the balancing-of-interests test here, the Court would not force either party to procreate by blind enforcement of the informed consent form. Instead, the Court would weigh the parties' relative interests and desires before permitting or

denying further procreation. *See, e.g.*, *A.Z.*, 725 N.E.2d at 1058 (applying the balancing-of-interests test).

This case is complicated. A decision in favor of either party under the balancing-of-interests test could force procreation. Reanna may become a genetic parent to the pre-embryos donated to another couple, or Axel may become a biological parent to Reanna's children resulting from IVF. *See* J.A. at 10–11 (citing the parties' desired outcomes). That said, it is essential to distinguish process from results. Whether a court should compel one party to be a parent against its will under the balancing-of-interests test is a separate inquiry addressed by the second issue before this Court. But before the Court can address that question, it must first decide on the proper framework for reaching its result. Is it the blind enforcement of a contract or an impartial and judicious review of the parties' relative interests and desires? Process matters. In cases where enforcing the parties' agreement would result in forced procreation, the balancing-of-interests test is a fairer procedural pathway than the contractual approach.

2. Applying the mutual contemporaneous consent approach would be inconsistent with precedent.

Most courts have rejected the mutual contemporaneous consent approach. *See, e.g.*, *Rooks*, 429 P.3d at 589 (categorically rejecting the mutual contemporaneous consent approach). Courts consider this framework inadequate for resolving disputes because it is unrealistic and gives one party a de facto veto over the other party. *Id.* These downsides outweigh the approach's only benefit: it does not force a party to procreate against its will. That said, avoiding forced procreation may be little

consolation to parties who are forced instead into an indefinite gridlock under this approach.

The mutual contemporaneous consent approach would be an ineffective framework for resolving the parties' dispute. Reanna and Axel have not reached a mutual decision regarding the disposition of their remaining pre-embryos. J.A. at 8–9, 19. If the Court applies the mutual contemporaneous consent approach here, the pre-embryos will stay in the Center's custody until the parties reach a joint decision. J.A. at 9, 11. Axel will achieve his desired result of avoiding procreation with Reanna so long as the pre-embryos remain in the Center's storage. J.A. at 9, 11. He will effectively prevail because the passage of time serves his interests, not because the Court decided he should win on the merits of this case. *See Rooks*, 429 P.3d at 589 (explaining the problematic de facto veto power inherent to this approach).

II. In the alternative, this Court should affirm because courts apply the balancing-of-interests test absent an enforceable agreement governing the disposition of the parties' pre-embryos after divorce.

Even if the contractual approach is appropriate in some cases (it is not here), jurisdictions that have applied it concede that the balancing-of-interests test is the best approach when there is no enforceable contractual agreement. *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992). An agreement's enforceability depends on whether the parties mutually assented to it.

A. Courts do not enforce agreements that lack mutual assent.

Mutual assent is a key requirement of an enforceable agreement. *See, e.g.*, *In re Hawthorne Townhomes, L.P.*, 282 S.W.3d 131, 139 (Tex. App.—Dallas 2009, no

pet.). Courts will not enforce a contract without both parties' clear offer and acceptance. *See, e.g.*, *Roach v. Dickenson*, 50 S.W.3d 709, 713 (Tex. App.—Eastland 2001, no pet.).

1. Informed consent forms that lack mutual assent are unenforceable as binding agreements in disputes between IVF couples.

A court may enforce an informed consent form for IVF only if the form manifests the parties' intent to be bound. *Jocelyn P. v. Joshua P.*, 250 A.3d 373, 380–81 (Md. Ct. Spec. App. 2021). Courts have expressed doubts as to whether informed consent forms in this context demonstrate mutual assent for three reasons: (1) form contracts lack express direction from the progenitors, (2) concerns about timing as it relates to formation and enforceability, and (3) treating an informed consent form as a binding divorce agreement extends the scope of the form beyond the parties' intent. *See, e.g.*, *id.* (finding boilerplate language that lacked express direction from the progenitors would not qualify as an express agreement); *A.Z.*, 725 N.E.2d at 1056–57 (finding agreements that lack durational provisions fail to demonstrate the parties' mutual assent over time).

First, informed consent forms are often form contracts containing boilerplate language drafted by a third-party IVF clinic. *Jocelyn P.*, 250 A.3d at 380. Because the substance of these contracts often lacks express direction from the progenitors, some courts have declined to permit these agreements to govern disputes between the progenitors for lack of mutual assent. *Id.*

Second, courts have cited concerns about the timing of the parties' intent to be bound. *See, e.g.*, *A.Z.*, 725 N.E.2d at 1056–57 (questioning an informed consent form's enforceability over time). Couples may have little time to review lengthy informed consent forms before signing them. And even if couples had more time to review the forms, the inherent difficulty of predicting one's future responses to life-altering events, like parenthood or divorce, persists. *Witten*, 672 N.W.2d at 777, citing Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 Minn. L. Rev. 55, 88–89 (1999). Further, informed consent forms lacking durational provisions are dubious as to the parties' intent over time. *A.Z.*, 725 N.E.2d at 1056–57. Absent an explicit provision, courts are reluctant to assume that the parties intended for the form to govern the disposition of their pre-embryos several years after execution. *Id.* This is especially true when a fundamental change in the parties' relationship has occurred, such as divorce. *Id.*

Lastly, courts have considered who the parties assent to be bound to when signing an IVF informed consent form. *See, e.g.*, *A.Z.*, 725 N.E.2d at 1056–58 (finding the informed consent form unenforceable because the parties intended for it to regulate disputes only between the couple and clinic). In this context, the primary purpose of an informed consent form is to address the relationship between the medical facility and the IVF couple. *Witten*, 672 N.W.2d at 782–83. These agreements are drafted by and for the clinic to carry out its operations; they are not meant to serve as binding agreements between the progenitors separately. *A.Z.*, 725 N.E.2d at

1056. The progenitors assent to be bound by their commitments to the clinic but not to each other. *Id.* An informed consent form does not transform into a binding divorce agreement simply by garnering the parties' signatures. *See id.*; *see also Patel v. Patel*, No. CL16000156-00, 2017 WL 11453591, at *2 (Va. Cir. Ct. Sept. 7, 2017) (concluding the informed consent form did not create a contract between the IVF patient and her partner). Treating it as such extends the agreement beyond the scope of the parties' intent. *See A.Z.*, 725 N.E.2d at 1056.

Here, it is doubtful that Reanna and Axel mutually assented to the informed consent form's provisions for the future disposition of pre-embryos. The form contained only boilerplate language drafted by the Center. J.A. at 36–38. This form is like the form signed by the parties in *Jocelyn P. v. Joshua P.* 250 A.3d at 380–81. There, the court held that boilerplate language from a third-party clinic that lacked express direction from the progenitors would not qualify as an agreement regulating the couple's dispute. *Id.* Absent an enforceable agreement, the court concluded that the balancing-of-interests test was the appropriate framework to apply; this Court should reach the same conclusion. *Id.*

Further, timing is a concern here. Reanna and Axel did not have the time to review, digest, and discuss the nine informed consent forms they signed in the 20-minute visit before their first IVF procedure. J.A. at 7, 36–38. The question about pre-embryos' disposition in the event of divorce has six options alone, each with complex long-term ramifications. J.A. at 38. Additionally, the form does not include a duration clause providing how long the parties intend for the form to govern the